TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 60

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS,

vs.

DIXIE CARRIERS, INC., GULF CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, ET AL.

No. 61

UNITED STATES OF AMERICA, APPELLANT,

vs.

DIXIE CARRIERS, INC., ET AL.

No. 62

INTERSTATE COMMERCE COMMISSION, APPELLANT,

vs.

DIXIE CARRIERS, INC., ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

NO. 60 FILED DECEMBER 21, 1956

NO. 61 AND NO. 62 FILED DECEMBER 27, 1956

PROBABLE JURISDICTION MARCH 25, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

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[fol. 1] [Caption omitted in printing]

[fol. 2] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE CORPORATION, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

COMPLAINT TO SET ASIDE, ANNUL, AND SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION—
Filed February 16, 1956

I.

This action is brought under Section 17(9) of the Interstate Commerce Act [Title 49 U.S.C., Section 17(9)] and Title 28 U.S.C., Sections 1336, 1398, 2284, 2321, 2322, 2323, 2324, and 2325, and pursuant to Section 10 of the Administrative Procedure Act (Title 5 U.S.C. Section 1009) to set aside, annul, and suspend the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, a proceeding entitled *Pipe-Official and Southern Territories to Southwest,* and to set aside, annul, and suspend the order of the said Commission dated December 9, 1955, in connection with a related proceeding docketed as Fourth Section Application No. 31120 and entitled *Steel and Wrought Iron Pipe to the Southwest* (said order being designated 26th Supplemental Fourth Section Order No. 17160), and all rate schedules or tariffs published or filed with the said Interstate Commerce Commission in purported compliance with or reliance upon said Orders, all as more fully hereinafter set forth.

II.

(1) Plaintiff Dixie Carriers, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Houston, Texas. It is [fol. 3] a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(2) Plaintiff Gulf-Canal Lines, Inc. is a corporation organized and existing under the laws of Texas, with its principal offices at Houston, Texas. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(3) Plaintiff Mississippi Valley Barge Line Company is a corporation organized and existing under the laws of the State of Delaware, with its principal offices in the State of Missouri. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(4) Plaintiff American Barge Line Company is a corporation organized and existing under the laws of the State of Delaw-re, with its principal offices at Jeffersonville, Indiana. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(5) Plaintiff Union Barge Line Corporation is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal offices at Pittsburgh, Pennsylvania. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(6) Plaintiff John I. Hay Company is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at Chicago, Illinois. It is

a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(7) Plaintiff Coyle Lines Incorporated is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at New Orleans, Louisiana. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

[fol. 4] (8) Plaintiff Federal Barge Lines, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal offices at St. Louis, Missouri. It is a certified common carrier by water, operating under and pursuant to Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission.

(9) Plaintiff Waterways Freight Bureau is an unincorporated voluntary association composed of the principal common carriers by water operating in the Mississippi River System, Gulf Intracoastal Waterway, and the Gulf of Mexico, including among its members the water carrier plaintiffs enumerated above.

III.

The United States of America is made defendant herein pursuant to the provisions of Title 28 U.S.C.A. Section 2322.

IV.

The water carrier plaintiffs enumerated above, in single or interline service, transport commodities generally by barge line between the principal pipe producing areas in those portions of the United States designated Official and Southern Territories, and the pipe consuming areas of that portion of the country designated the Southwest. The transportation of pipe between such areas is and for many years has been a most important part of their traffic and produces revenues which are very important to the financial stability of the said plaintiffs and to their continued ability to provide adequate common carrier service.

V.

By application filed on their behalf with the Interstate Commerce Commission under date of September 16, 1955, and docketed by the said Commission as Fourth Section Application 31120, rail carriers, party to certain agency tariffs, sought authority to put into effect certain drastically reduced rates on steel and wrought iron pipe moving from various origins in Official and Southern Territories to various destinations in the Southwest, in violation of Section 4(1) of the Interstate Commerce Act [49 U.S.C. Section [fol. 5] 4(1)],[1] which makes it unlawful for such carrier to charge more for the transportation of like property for a shorter than for a longer distance over the same line or route in the same direction.

At the same time there was also published and filed with the Commission on behalf of said rail carriers a joint tariff entitled Supplement 43 to Agent Kratzmeir's I.C.C. 4116,

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[1] It shall be unlawful for any common carrier subject to this part of part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: *and provided further,* that tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

and Agent Hinsch's I.C.C. 4615, which would have made such reduced rates effective on October 26, 1955.

Plaintiff water carriers, through the Waterways Freight Bureau, which acted for them and on their behalf, petitioned said Commission to suspend the operation of the said tariff and to deny the relief from provisions of Section 4(1) sought by the said application. Similar petitions were filed by other interested parties. Responses thereto were filed on behalf of the said rail carriers.

Pursuant to the Commission's rules and regulations, and delegations of functions made by the Commission,[2] the matter of the protests against the rates as published was referred to the Commission's Board of Suspension, and the matter of the application for relief from the provisions of Section 4(1) of the Act, and the protests thereto, was referred to the Commission's Fourth Section Board.

[fol. 6] Under date of October 20, 1955, the Commission, by its Board of Suspension acting under such delegation, entered an order suspending[3] the operation of the said joint rate tariff (except one item thereof) and instituting an investigation thereof in a proceeding designated Investigation and Suspension Docket No. 6491, and entitled *Pipe-Official and Southern Territories to Southwest.* A copy of that order is appended hereto as Exhibit 1. At that time neither the Commission nor any Division or Board thereof took any action on the related matter of the application for relief from the provisions of Section 4(1).

Thereafter, by order dated November 25, 1955, the Commission assigned both such proceedings, I. & S. Docket No. 6491 and F.S.A. Docket No. 31120, for hearing before a Hearing Examiner of the Commission at Houston, Texas, to begin on January 24, 1956.[4] A copy of that order is appended hereto as Exhibit 2.

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[2] Under authority of Section 17(2) of the Interstate Commerce Act [49 U.S.C. 17(2)].

[3] Under authority of Section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)].

[4] That hearing did commence on that date. On January 27, 1955, the Hearing Examiner having other commitments for the following week, the hearing was adjourned. It is to be recessed in Washington, D. C. on March 5, 1956.

In the meantime, on or about October 26, 1955, there had been filed with the Commission on behalf of said rail carriers a petition for reconsideration of the Order of the Board of Suspension of October 20, 1955, in I. & S. Docket No. 6491.

At the same time there was also filed on behalf of said rail carriers in the proceeding under F.S.A. 31120, a petition entitled "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application Herein, Dated September 16, 1955."

Plaintiff water carriers again acting through their agency, Waterways Freight Bureau, filed timely replies to these documents.

VI.

Under date of December 7, 1955 the Commission, by Division 2, acting as an Appellate Division, entered an order vacating its order, by the Board of Suspension, of October 20, 1955, in I. & S. 6491, such vacation to be effective December 17, 1955. That order was served on Decem- [fol. 7] be. 13, 1955. A copy of that order is appended hereto as Exhibit 3.

Under date of December 9, 1955, and obviously responsive to the petition of October 26, 1955, in F.S.A. 31120, the Commission entered an order designated 26th Supplemental Fourth Section Order No. 17160, granting the requested relief from the prohibition of Section 4(1) of the Act, effective "upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120." [The "effective date of the rates" was to be December 17, 1955, as provided in the order of December 7, 1955 (Exhibit 3) vacating the order of suspension in I. & S. Docket No. 6491.] That order was served on December 27, 1955, and a copy thereof is appended hereto Exhibit 4. Its wording indicates confusion within the Commission as to the procedural status of that matter at that point. In the heading it is indicated that the order was the result of action by Division 2 of the Commission, sitting as an Appellate Division. The fact, so far as plaintiffs are able to determine it, is that there had

been no previous action on the Fourth Section matter by the Commission, nor any Division or other agency thereof, except to assign it to a Hearing Examiner for hearing (Exhibit 2), and therefore it was not in any sense an appellate action. The evident confusion is not clarified by the final line, which states that it is the action of the Commission, by its Fourth Section Board.

VII.

Immediately upon obtaining informal advice that such orders had been entered, and necessarily before the orders themselves had been served upon them or otherwise made available, plaintiff water carriers, again through their agency, Waterways Freight Bureau, and others adversely affected, filed petitions for reconsideration of the order of December 7 in I. & S. Docket No. 6491 and the order of December 9 granting the relief sought in F.S.A. 31120. The petition of plaintiffs was dated December 13, 1955, was filed with the Commission on December 14, 1955, and included a specific prayer for a stay of such orders pending reconsideration, pursuant to the provisions of Section 17(8) of the Interstate Commerce Act [49 U.S.C. 17(8)], which provides, *inter alia*, that where reconsideration of an initial [fol. 8] decision by the Commission is sought the effective date of such decision shall be stayed pending disposition of the matter.[5]

VIII.

Under date of December 5, 1955, the Commission released a notice, signed by its Secretary, with reference to the said

[5] (8) Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

petitions for reconsideration insofar as they related to the issue of I. & S. Docket No. 6491, advising that such petitions would "not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission." Copy of that Notice is appended hereto as Exhibit 5.

Under date of December 16, 1955, the Commission released another notice, signed by its Secretary, again with reference to I. & S. Docket No. 6491, advising that "The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955, and the petitions making such request have been denied." Copy of that notice is appended hereto as Exhibit 6.

The Commission took no action whatever, so far as plaintiffs are able to determine, with respect to the petition insofar as it sought reconsideration of the order of December 9, 1955, granting relief from the prohibition of Section 4(1).

The reduced rates in question thus were permitted to become effective on December 17, 1955, with the effective date of the order of December 7, 1955, vacating the suspension order in I. & S. 6491, and pursuant to the Fourth Section Relief afforded by the order of December 9, 1955, without which relief such rates would be in direct violation of the prohibition of Section 4(1).

[fol. 9] IX.

By its action aforesaid, the Commission has failed and neglected to afford consideration of plaintiffs' petition for reconsideration of the initial action of the Commission in granting the said Fourth Section Relief, and has deprived plaintiffs of the benefit and protection provided by Section 17(8) of the Act, pursuant to which the effective date of such initial action responsive to Fourth Section Application No. 31120 should have been "stayed or postponed pending disposition of the matter by the Commission or appellate division * * *".

X.

Section 4(1) of the Interstate Commerce Act[6] prohibits the charging of higher rates for a shorter than for a longer haul over the same line or route in the same direction, subject only to the exception that the Interstate Commerce Commission may in special cases and after investigation grant petitioning carriers relief from such prohibition. It contains no provision for the granting of temporary relief prior to such investigation, and by its very terms makes the granting of such relief a condition precedent to the effectiveness of tariffs containing rates made in violation of the prohibition contained in that section.

Here the Commission has applied the statute in such manner as to make the grant of relief from the prohibition of Section 4(1) subservient to the operation of the rates, rather than to follow the reverse procedure which the statute clearly contemplates; and it has granted such relief without the investigation which the statute requires, which the Commission itself initiated, and the form and scope of which the Commission determined when it assigned the matter for hearing[7] as described above, all in contravention of the plain intent of the statute, and to the injury of plaintiff water carriers.

[fol. 10] XI.

The Commission's order of December 7, 1955 (Exhibit 3) vacating its order of suspension in I. & S. Docket No. 6491 (Exhibit 1) states as its sole foundation and only justification:

> "*It further appearing,* That consideration has been given to a petition of the respondent requesting vaca-

[6] 49 U.S.C. 4(1)—Quoted in footnote 1, *supra.*

[7] Recognition by the Commission that the requirement of Section 4(1) that authorization of relief shall be granted, if at all, after investigation, clearly implies that the question shall be determined upon testimony and after a hearing, is evidenced by the fact that Rule XVIII(f) of its Rules of Practice relating to Fourth Section applications (Volume 8, Interstate Commerce Act Annotated, page 6267), includes the statement "It is the uniform practice of the Commission to hold hearings upon the request of any interested party."

tion of the order of suspension, and replies thereto; and good cause appearing therefor:".

By that action, unsupported by even the slightest indication of facts or reasons underlying the action, the Commission reversed its early action by which it found that it appeared that the rates as published would result in violations of the Interstate Commerce Act. Specifically, the Commission (Board of Suspension) had earlier found:

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:" [8]

Both the ordinary rules of orderly procedure, and the spirit and the letter of the Administrative Procedure Act,[9] require that the Commission enter its orders upon the basis of stated reasons therefor, sufficiently explicit to appraise the parties at interest of the facts, circumstances and considerations which have impelled its action.

XII.

By its actions as hereinbefore described the Commission has acted arbitrarily and capriciously, and contrary to the [fol. 11] applicable statute. Unless restrained by this Court, the Commission will permit for an indeterminate period the railroad competitors of these plaintiffs to main-

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[8] Exhibit 1, second paragraph.

[9] For example, Section 8(b) of the Administrative Procedure Act [49 U.S.C. 1007(b)] provides in part "• • • All decisions (including initial, recommended, or tentative decisions) shall become a part of the record, and include a statement of (1) findings and conclusions, as well as the reasons or basis thereof, upon all the material issues of fact, law or discretion presented on the record • • •."

tain reduced rates in violation of the prohibition of Section 4(1) of the Act, at levels which will result in serious and irreparable injury to thsee water carrier plaintiffs.

WHEREFORE, the plaintiffs pray:

1. That a court, consisting of three judges, constituted as required by Title 28, U.S.C. Section 2284, be convened, and that process and notice be given to the defendant as required by law.

2. That upon final hearing the court adjudicate, order and decree that the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, and the order of the Commission dated December 9, 1955, granting the relief sought in Fourth Section Application No. 31120, are unlawful, null and void *ab initio* and that they be set aside and that the enforcement thereof be enjoined, annulled and set aside; and that the use in interstate or foreign commerce of Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and any and all other railroad rate tariffs and schedules which became or were allowed to become effective by reason of the said orders of December 7 and 9, 1955 (to the extent that they publish rates suspended by the Order of October 20, 1955, or rates which are in contravention of Section 4(1) of the Interstate Commerce Act) be prohibited until such time as the Order of October 20, 1955 in Investigation and Suspension Docket No. 6491 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission, and the Interstate Commerce Commission shall have concluded its investigation into the matters and things involved in Fourth Section Application No. 31120 and shall have issued a lawful and valid order thereon.

3. That plaintiffs be given such other and further relief [fol. 12] as may be equitable and proper in the premises.

Nuel D. Belnap, Belnap and McAuliffe, One North La Salle Street, Chicago 1, Illinois

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, Macleay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas
Attorneys for Plaintiffs

Duly sworn to by J. S. Hinkle jurat omitted in printing.

[fol. 13] EXHIBIT 1 TO COMPLAINT

SECOND CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On Page 6 thereof, ITEM 360-C, and on pages 2 and 4 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would if permitted to become effective, result in rates and charges, rules, regulations or practices

which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 14] EXHIBIT 2 TO COMPLAINT

I&S No. 6491, ET AL TM:HA

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

NOVEMBER 25, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE-OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

The above-entitled proceedings are assigned for hearing on January 24, 1956, at 9:30 o'clock a.m., United States Standard Time, at the Federal Office Bldg., Franklin & Fannin Sts., Houston, Tex., before Examiner, Hanson.

The attention of the parties is directed to the General Rules of Practice, Rule 84(d), the provisions of which point to the desirability of interchange of exhibits and other pertinent material before the hearing.

By the Commission.

HAROLD D. MCCOY,
Secretary.

[fol. 15] EXHIBIT 3 TO COMPLAINT

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices

stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; and good cause appearing therefor:

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY
Secretary

(SEAL)

[fol. 16] EXHIBIT 4 TO COMPLAINT

Twenty-sixth Supplemental Fourth Section Order No. 17160

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A. D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of

fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. MCCOY,
Secretary.

(SEAL)

[fol. 17] EXHIBIT 5 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION
Washington

December 15, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

NOTICE

This refers to certain petitions tendered herein seeking reconsideration or review by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension.

The said petitions will not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission. See item 8.4 of the Organization Minutes of the Commission, 20 Federal Register 5031, 5035.

The petitions will be considered by the appropriate appellate division for action as provided by Rule 101(g) of the Commission's General Rules of Practice.

Harold D. McCoy,
Secretary.

[fol. 18] EXHIBIT 6 TO COMPLAINT

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D. C.

December 16, 1955

NOTICE

Upon consideration of a petition filed by respondents requesting vacation of the order of suspension in I. and S. Docket No. 6491 dated October 20, 1955, the Commission in its order of December 7, 1955 concluded to vacate the

order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved.

Several of the protestants filed petitions requesting the Commission to reconsider its action and to stay the order of December 7, 1955.

The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955 and the petitions making such request have been denied.

HAROLD D. McCOY,
Secretary.

[fol. 19] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE COMPANY, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

JOE D. HUGHES, INC., HUNSAKER TRUCKING CONTRACTOR, INC., COMBS TRUCK LINE, INC., YOUNGER BROS.-J. M. ENGLISH TRUCK LINES, INC., SOUTHWEST OILFIELD TRANSPORTATION CO., PRATHER TRUCK LINE, INC., Intervenors.

MOTION OF JOE D. HUGHES, INC., ET AL. TO INTERVENE AS PLAINTIFFS—Filed March 1, 1956

I.

Intervenors move for leave to intervene as plaintiffs in this action as of right as provided in Title 28, #2323, U.S.C. (28 U.S.C.A. #2323) and Title 28, Rule 24, in order

to assert the same complaints alleged by plaintiffs in this action and as set forth in intervenors' proposed complaint, copy of which is hereto attached, on the grounds that all of intervenors herein timely petitioned the Interstate Commerce Commission, along with the plaintiff water carriers, to suspend the operation of the rail tariffs involved in [fol. 20] the proceedings before the Interstate Commerce Commission now designated as Investigation and Suspension Docket No. 6491, entitled *Pipe—Official and Southern Territories to Southwest;* and likewise petitioned said Commission to deny the rail carriers' petition for relief from the provisions of Section 4(1) of the Interstate Commerce Act and which proceeding is designated by the Commission as FSA Docket Number 31120. That these intervenors have continued their protest before the hearing examiner of the Commission to which both proceedings were assigned for hearing. Intervenors are therefore parties in interest to these proceedings before the Interstate Commerce Commission and entitled to appear as parties herein of their own motion and as of right as provided by said #2323, Title 28, U.S.C. and the questions of law and fact to be presented by intervenors are common to the main action.

/s/ John C. Ridley, 2606 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervenors.

[fol. 21] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL. FOR LEAVE TO INTERVENE AS DEFENDANTS—Filed March 6, 1956

Now come The Atchison, Topeka and Santa Fe Railway Company, et al., by their attorneys, and move the Court

for an order permitting them to intervene as defendants in the above-entitled action. As grounds for such order, movants show to the Court that:

I

(a) The Atchison, Topeka and Santa Fe Railway Company is a corporation organized and existing under the laws of the State of Kansas, with offices at Chicago, Illinois.

(b) Gulf, Colorado and Sante Fe Railway Company is a corporation organized and existing under the laws of the State of Texas, with offices at Galveston, Texas.

(c) Panhandle and Santa Fe Railway Company is a corporation organized and existing under the laws of the State of Texas, with offices at Amarillo, Texas.

(d) The Baltimore and Ohio Railroad Company is a corporation existing under the laws of the State of Maryland, with offices at Baltimore, Maryland.

(e) Chicago, Rock Island and Pacific Railroad Company is a corporation existing under the laws of the State of Delaware, with offices at Chicago, Illinois.

(f) Erie Railroad Company is a corporation existing under the laws of the State of New York, with offices at Cleveland, Ohio.

[fol. 22] (g) The Kansas City Southern Railway Company is a corporation existing under the laws of the State of Missouri, with offices at Kansas City, Missouri.

(h) Missouri Pacific Railroad Company is a corporation existing under the laws of the State of Missouri, with offices at St. Louis, Missouri, and is the successor in interest and assign of Guy A. Thompson Trustee, Missouri Pacific Railroad Company, Guy A. Thompson, Trustee, International-Great Northern Railroad Company, and Guy A. Thompson, Trustee, New Orleans, Texas and Mexico Railway Company.

(i) New York Central Railroad Company is a corporation existing under the laws of the States of New York, Pennsylvania, Ohio, Indiana, Michigan and Illinois, with offices at New York, New York.

(j) The Pittsburgh and Lake Erie Railroad Company is a corporation existing under the laws of the State of Pennsylvania, with its offices at Pittsburgh, Pennsylvania.

(k) The New York, Chicago and St. Louis Railroad Company is a corporation existing under the laws of the State of Ohio, with offices at Cleveland, Ohio.

(l) The Pennsylvania Railroad Company is a corporation existing under the laws of the State of Pennsylvania, with offices at Philadelphia, Pennsylvania.

(m) Southern Pacific Company is a corporation existing under the laws of the State of Delaware, with offices at San Francisco, California.

(n) Texas and New Orleans Railroad Company is a corporation existing under the laws of the State of Texas, with offices at Houston, Texas.

(o) The Texas and Pacific Railway Company is a corporation existing under an Act of Congress, with offices at Dallas, Texas.

[fol. 23]

II

Movants are railroads engaged in the transportation of passengers and freight in interstate commerce within The United States of America, including the transportation of steel and wrought iron pipe from the principal pipe producing areas in the eastern and southern parts of the country to the southwestern part of the country.

III

Movants are respondents in the proceedings before the Interstate commerce Commission referred to in the complaint as Investigation and Suspension Docket No. 6491, *Pipe—Official and Southern Territories to Southwest,* and

Fourth Section Application No. 31120, *Steel and Wrought Iron Pipe to the Southwest.* Movants have a right to intervene in this action under the provisions of Section 2323 of Title 23 of the United States Code and Rule 24 of the Rules of Civil Procedure for The United States District Courts.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas.

Edwin N. Bell, Baker, Botts, Andrews & Shepherd, 1600 Esperson Bldg., Houston 2, Texas.

Robert H. Bierma, 652 Union Station, Chicago 6, Illinois.

Harry E. Boe, LaSalle Street Station, Chicago 5, Illinois.

Robert G. Boes, 3016 Terminal Tower, Cleveland, Ohio.

[fol. 24] Ralph M. Buzek, 1315 Union Central Life Bldg., Cincinnati 2, Ohio.

J. T. Clark, Midland Bldg., Cleveland 15, Ohio.

William E. Davis, 114 W. 11th St., Kansas City 5, Missouri.

Harvey Huston, 1211 Railway Exchange Bldg., Chicago 4, Illinois.

William R. McDowell, Texas and Pacific Bldg., 1025 Elm St., Dallas, Texas.

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois.

Walter G. Treanor, Missouri Pacific Bldg., St. Louis, Missouri.

Attorneys for Intervening Railroads.

[fol. 25] To: Messrs. Nuel D. Belnap, Belnap and McAuliffe, One North LaSalle Street, Chicago 1, Illinois.

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas.

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, McLeay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas.
Attorneys for Plaintiffs.

To: The Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.
The Attorney General, Washington, D. C.
Attorneys for Defendant, United States of America.

To: Mr. John C. Ridley, 2606 Niels Esperson Bldg., Houston, Texas, Attorney for Intervening Truck Lines.

The intervening railroads will move the submission of the above motion to this Court on Monday, March 19, 1956.

Palmer Hutcheson, Jr., Hutcheson, Taliaferro and Hutcheson, Attorney for Intervening Railroads.

A copy of the above motion and the accompanying pleadings were served upon attorneys for all parties by mailing copies thereof addressed to each of them this date.

Palmer Hutcheson, Jr.

This 6th day of March, 1956.

[fol. 26] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF WABASH RAILROAD COMPANY FOR LEAVE TO INTERVENE AS DEFENDANT—Filed March 15, 1956

Now comes Wabash Railroad Company, by its attorneys, and moves the Court for an order permitting it to intervene as a defendant in the above-entitled action. As grounds for such order, movant shows to the Court that:

I

Wabash Railroad Company is a corporation organized and existing under the laws of the State of Ohio, with offices at St. Louis, Missouri.

II

Wabash Railroad Company is a railroad engaged in the transportation of passengers and freight in interstate commerce within the United States of America, including the transportation of steel and wrought iron pipe from the principal pipe producing areas in the eastern and southern parts of the country to the southwestern part of the country.

III

Wabash Railroad Company is a respondent in the proceedings before the Interstate Commerce Commission referred to in the complaint as Investigation and Suspension [fol. 27] Docket No. 6491, *Pipe—Official and Southern Territories to Southwest,* and Fourth Section Application No. 31120, *Steel and Wrought Iron Pipe to the Southwest.* Wabash Railroad Company has a right to intervene in this action under the provisions of Section 2323 of Title 23 of the United States Code and Rule 24 of the Rules of Civil Procedure for the United States District Courts.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas.

Eugene S. Davis, Railway Exchange Bldg., St. Louis 1, Missouri.

Attorneys for Wabash Railroad Company.

[fol. 28] To: Messrs. Nuel D. Belnap, Belnap and McAuliffe, One North La Salle Street, Chicago 1, Illinois.

T. S. Christopher, Christopher and Bailey, Continental Life Building, Fort Worth 2, Texas.

Harry C. Ames, Ames, Hill and Ames, Transportation Building, Washington 5, D. C.

Donald Macleay, Francis W. McInerny, McLeay, Lynch & MacDonald, 1625 K Street, N. W., Washington 6, D. C.

Alan S. Dale, Eastham, Hinds & Dale, 212 Cotton Exchange Building, Houston 2, Texas.
Attorneys for Plaintiffs.

To: The Honorable Malcolm R. Wilkey, United States Attorney, Houston, Texas.
The Attorney General, Washington, D. C.
Attorneys for Defendant, United States of America.

To: Mr. John C. Ridley, 2606 Niels Esperson Bldg., Houston, Texas, Attorney for Intervening Truck Lines.

Attorneys for Intervening Railroads who filed their Motion to Intervene on March 6, 1956, have previously been furnished copies of this Motion and the accompanying pleadings.

The Wabash Railroad Company will move the submission of the above Motion to this Court on Monday, March 26, 1956.

Palmer Hutcheson, Jr., Hutcheson, Taliaferro and Hutcheson, Attorney for Wabash Railroad Company.

A copy of the above motion and the accompanying pleadings were served upon attorneys for all parties by mailing copies thereof addressed to each of them this date.

This 15th day of March, 1956.

Palmer Hutcheson, Jr.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION—March 29, 1956

The motion of Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.-J. M. English Truck Lines, Inc., Southwest Oilfield Trans-

portation Co., and Prather Truck Line, Inc. to intervene as parties plaintiff is granted, and the clerk will forthwith file their complaint.

The motion of The Atchison, Topeka and Santa Fe Railway Company, Gulf, Colorado and Santa Fe Railway Company, Panhandle and Santa Fe Railway Company, The Baltimore and Ohio Railroad Company, Chicago, Rock Island and Pacific Railroad Company, Erie Railroad Company, The Kansas City Southern Railway Company, Missouri Pacific Railroad Company, New York Central Railroad Company, The Pittsburgh and Lake Erie Railroad Company, The New York, Chicago and St. Louis Railroad Company, The Pennsylvania Railroad Company, Southern Pacific Company, Texas and New Orleans Railroad Company, and The Texas and Pacific Railway Company to intervene as parties defendant is granted, and the clerk will forthwith file their answer.

The motion of Wabash Railroad Company to intervene as a party defendant is granted, and the clerk will forthwith file its answer.

The clerk will forthwith forward a copy of this order to all attorneys of record.

Done at Houston, Texas, on this, the 29th day of March, 1956.

/s/ Joe Ingraham, United States District Judge.

[fol. 30] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

INTERVENORS', JOE D. HUGHES, INC. ET AL., COMPLAINT TO SET ASIDE, ANNUL, AND SUSPEND ORDERS OF THE INTERSTATE COMMERCE COMMISSION—Filed March 29, 1956

I.

This action is brought under Section 17(9) of the Interstate Commerce Act (Title 49 U.S.C., Section 17(9)) and

Title 28 U.S.C., Sections 1336, 1398, 2284, 2321, 2322, 2323, 2324, and 2325, and pursuant to Section 10 of the Administrative Procedure Act (Title 5 U.S.C. Section 1009) to set aside, annul, and suspend the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, a proceeding entitled *Pipe—Official and Southern Territories to Southwest,* and to set aside, annul, and suspend the order of the said [fol. 31] Commission dated December 9, 1955, in connection with a related proceeding docketed as Fourth Section Application No. 31120 and entitled *Steel and Wrought Iron Pipe to the Southwest* (said order being designated 26th Supplemental Fourth Section Order No. 17160), and all rate schedules or tariffs published or filed with the said Interstate Commerce Commission in purported compliance with or reliance upon said Orders, all as more fully hereinafter set forth.

II.

1) Intervenor, JOE D. HUGHES, INC., is a corporation organized and existing under the laws of the State of Texas with its principal office at Houston, Texas. It is a certified common carrier by motor vehicle operating under and pursuant to certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing the transportation of so-called oilfield commodities within the territorial limits described in its said certificate.

2) Intervenors, HUNSAKER TRUCKING CONTRACTOR, INC., COMBS TRUCK LINE, INC., YOUNGER BROS.-J. M. ENGLISH TRUCK LINES, INC., SOUTHWEST OILFIELD TRANSPORTATION CO., and PRATHER TRUCK LINE, INC. are each and all corporations organized and existing under the laws of the State of Texas with their respective principal offices in Houston, Harris County, Texas, with the exception of intervenor, HUNSAKER TRUCKING CONTRACTOR, INC., whose principal office is located in Dallas, Texas, but it maintains an office and terminal facilities in Houston, Harris County, Texas. That each and all of said intervenors are common carriers by motor vehicle operating under and pursuant to certificates of public convenience and necessity issued by the Interstate Commerce Commission to each authoriz-

[fol. 32] ing the transportation of so-called oilfield commodities within the territorial limits described in the respective certificates issued to each.

III.

The United States of America is made defendant herein pursuant to the provisions of Title 28 U.S.C.A. Section 2322.

IV.

Intervenors herein transport commodities for the oil and gas industry by motor vehicle between the various oil producing states in the United States including Texas, Louisiana, Oklahoma, New Mexico, Mississippi, Arkansas, Kansas, as their respective operating Certificates of Public Convenience and Necessity may permit. That a most substantial portion of the commodities which they transport consists of pipe for the oil and gas industry and a great proportion of the pipe which they so transport has first been transported from manufacturing areas in the Eastern United States by the plaintiff common carrier barge lines. The transportation of pipe has for many years been a most essential and important part of the traffic of these intervenors and produces revenues which are essential to their financial stability and to their continued ability to provide adequate motor carrier service to the oil and gas industry as presently authorized under their Certificates of Public Convenience and Necessity.

V.

Intervenors adopt by reference pursuant to Rule 10(c) (28, U.S.C.A. #10(c)) those paragraphs numbered V and [fol. 33] VI in plaintiffs' complaint filed herein. In lieu of paragraph VII of plaintiffs' complaint these intervenors allege that upon receipt of a telegram from Hon. H. D. McCoy, Secretary, Interstate Commerce Commission, dated Friday, December 9, 1955, at 5:01 P. M. and delivered on Saturday, December 10, 1955, stating that the Commission had voted to vacate "I. & S. 6491 as of December 17 but to continue the investigation", these intervenors thereupon

petitioned the Commission by telegram and by letter petition, both dated December 13, 1955, requesting the stay of such vacating order pending reconsideration by the Commission and pending completion of the ordered investigation.

VI.

Intervenors further adopt by reference pursuant to Rule 10(c) paragraphs VIII, IX, X, XI and XII of plaintiffs' complaint filed herein as fully to all intents and purposes as if copied verbatim herein.

WHEREFORE, intervenors pray:

1) That a court, consisting of three judges, constituted as required by Title 28, U.S.C. Section 2284, be convened, and that process and notice be given to the defendant as required by law.

2) That upon final hearing the court adjudicate, order and decree that the order of the Interstate Commerce Commission dated December 7, 1955, in its Investigation and Suspension Docket No. 6491, and the order of the Commission dated December 9, 1955, granting the relief sought in Fourth Section Application No. 31120, are unlawful, null and void *ab initio* and that they be set aside and that the enforcement thereof be enjoined, annulled and set aside; [fol. 34] and that the use in interstate or foreign commerce of Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and any and all other railroad rate tariffs and schedules which became or were allowed to become effective by reason of the said orders of December 7 and 9, 1955 (to the extent that they publish rates suspended by the Order of October 20, 1955, or rates which are in contravention of Section 4(1) of the Interstate Commerce Act) be prohibited until such time as the Order of October 20, 1955 in Investigation and Suspension Docket No. 6491 shall have been rescinded or modified by lawful action of the Interstate Commerce Commission, and the Interstate Commerce Commission shall have concluded its investigation into the matters and things involved in Fourth Section Application No. 31120 and shall have issued a lawful and valid order thereon.

3) That intervenors be given such other and further relief as may be equitable and proper in the premises.

/s/ John C. Ridley, 2606 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervenors.

[fol. 35] *Duly sworn to by A. R. Duke*
jurat omitted in printing.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF INTERVENING RAILROADS—Filed March 29, 1956

The intervening railroads listed in Appendix A hereto attached, without waiving their right to file a motion to dismiss at a later time, hereby answer the complaint heretofore filed, stating:

I.

In answer to Paragraph I of the complaint, it is submitted that the Court is without power to review the exercise by the Commission of its administrative discretion with respect to the matters complained of.

II.

In answer to Paragraph II of the complaint, intervening railroads state that they are without knowledge as to the truth of such allegations and therefore neither admit nor deny such allegations.

III.

Intervening railroads admit the allegations of Paragraph III of the complaint.

IV.

In answer to Paragraph IV of the complaint, intervening railroads state that they are without knowledge as to the truth of such allegations and therefore neither admit nor deny such allegations.

[fol. 37]

V.

In answer to Paragraph V of the complaint, intervening railroads admit that (a) Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, (b) that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 20, 1955, (c) that petitions for suspension and for denial of fourth-section relief were filed by plaintiffs herein and other parties and that the intervening railroads and others replied thereto, (d) that thereafter the Commission issued orders reproduced as Exhibits 1 and 2 to the complaint herein, (e) that on or about October 26, 1955, the intervening railroads and others filed petitions for reconsideration by the Commission of the Order of the Suspension Board of October 20, 1955 and for immediate issuance of the authority sought in Fourth Section Application No. 31120, and (f) that Waterways Freight Bureau filed a reply document.

Intervening railroads deny all other allegations in Paragraph V of the complaint.

VI.

In answer to Paragraph VI of the complaint, intervening railroads admit that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein.

Intervening railroads deny all other allegations in Paragraph VI of the complaint.

[fol. 38]

VII.

In answer to Paragraph VII of the complaint, intervening railroads admit that certain petitions were tendered to the Interstate Commerce Commission seeking reconsidera-

tion or review of appellate action of Division 2 of the Commission.

Intervening railroads deny all other allegations in Paragraph VII.

VIII.

In answer to Paragraph VIII of the complaint, intervening railroads admit that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but deny that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Intervening railroads deny all other allegations in Paragraph VIII.

IX.

Intervening railroads deny the allegations of Paragraph IX of the complaint.

X.

In answer to Paragraph X of the complaint, intervening railroads admit that Section 4(1) of the Interstate Commerce Act prohibits the charging of higher rates for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided that the Interstate Commerce Commission may in special cases and after investigation grant relief from such prohibition.

Intervening railroads deny all other allegations in Paragraph X of the complaint.

[fol. 39]

XI.

In answer to Paragraph XI of the complaint, intervening railroads admit the accuracy of the quoted extracts from the orders referred to, and deny all other allegations.

XII.

Intervening railroads deny the allegations of Paragraph XII of the complaint, and assert that the relief sought by

plaintiffs, if granted, would result in severe and irreparable injury to intervening railroads.

WHEREFORE, intervening railroads pray that the relief sought by plaintiffs be denied and that the complaint be dismissed.

/s/ Palmer Hutcheson, Jr., Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas

Edwin N. Bell, Baker, Botts, Andrews & Shepherd, 1600 Esperson Bldg., Houston 2, Texas

Robert H. Bierma, 652 Union Station, Chicago 6, Illinois

Harry E. Boe, LaSalle Street Station, Chicago 5, Illinois

Robert G. Boes, 3016 Terminal Tower, Cleveland, Ohio

Ralph M. Buzek, 1315 Union Central Life Bldg., Cincinnati 2, Ohio

J. T. Clark, Midland Bldg., Cleveland 15, Ohio

William E. Davis, 114 W. 11th St., Kansas City 5, Missouri

[fol. 40] Harvey Huston, 1211 Railway Exchange Bldg., Chicago 4, Illinois

William R. McDowell, Texas and Pacific Bldg., 1025 Elm St., Dallas, Texas

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois

Walter G. Treanor, Missouri Pacific Bldg., St. Louis, Missouri

Attorneys for Intervening Railroads.

[fol. 41] APPENDIX A TO ANSWER

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company

[fol. 42] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF WABASH RAILROAD COMPANY—
Filed March 29, 1956

Wabash Railroad Company, intervening as a defendant herein, without waiving its right to file a motion to dismiss at a later time, hereby answers the complaint heretofore filed, stating:

I

In answer to Paragraph I of the complaint, it is submitted that the Court is without power to review the exer-

cise by the Commission of its administrative discretion with respect to the matters complained of.

II

In answer to Paragraph II of the complaint, Wabash Railroad Company states that it is without knowledge as to the truth of such allegations and therefore neither admits nor denies such allegations.

III

Wabash Railroad Company admits the allegations of Paragraph III of the complaint.

IV

In answer to Paragraph IV of the complaint, Wabash Railroad Company states that it is without knowledge as to the truth of such allegations and therefore neither admits nor denies such allegations.

[fol. 43]

V

In answer to Paragraph V of the complaint, Wabash Railroad Company admits that (a) Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, (b) that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 26, 1955, (c) that petitions for suspension and for denial of fourth-section relief were filed by plaintiffs herein and other parties and that interested railroads replied thereto, (d) that thereafter the Commission issued orders reproduced as Exhibits 1 and 2 to the complaint herein, (e) that on or about October 26, 1955, interested railroads filed petitions for reconsideration by the Commission of the Order of the Suspension Board of October 20, 1955 and for immediate issuance of the authority sought in Fourth Section Application No. 31120, and (f) that Waterways Freight Bureau filed a reply document.

Wabash Railroad Company denies all other allegations in Paragraph V of the complaint.

VI

In answer to Paragraph VI of the complaint, Wabash Railroad Company admits that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein.

Wabash Railroad Company denies all other allegations in Paragraph VI of the complaint.

VII

In answer to Paragraph VII of the complaint, Wabash Railroad Company admits that certain petitions were tendered to the Interstate Commerce Commission seeking reconsideration or review of appellate action of Division [fol. 44] 2 of the Commission.

Wabash Railroad Company denies all other allegations in Paragraph VII.

VIII

In answer to Paragraph VIII of the complaint, Wabash Railroad Company admits that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but denies that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Wabash Railroad Company denies all other allegations in Paragraph VIII.

IX

Wabash Railroad Company denies the allegations of Paragraph IX of the complaint.

X

In answer to Paragraph X of the complaint, Wabash Railroad Company admits that Section 4(1) of the Interstate Commerce Act prohibits the charging of higher rates for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, provided that the Interstate Commerce Commission may in special cases and after investigation grant relief from such prohibition.

Wabash Railroad Company denies all other allegations in Paragraph X of the complaint.

XI

In answer to Paragraph XI of the complaint, Wabash Railroad Company admits the accuracy of the quoted extracts from the orders referred to, and denies all other allegations.

[fol. 45] XII

Wabash Railroad Company denies the allegations of Paragraph XII of the complaint, and asserts that the relief sought by plaintiffs, if granted, would result in severe and irreparable injury to Wabash Railroad Company.

WHEREFORE, Wabash Railroad Company prays that the relief sought by plaintiffs herein be denied and that the complaint be dismissed.

Palmer Hutcheson, Jr., Hutcheson, Taliaferrro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas

Eugene S. Davis, Railway Exchange Bldg., St. Louis 1, Missouri

Attorneys for Wabash Railroad Company.

[fol. 46] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

MOTION AND NOTICE OF MOTION OF THE INTERSTATE COMMERCE COMMISSION FOR LEAVE TO INTERVENE—Filed April 13, 1956

Pursuant to Rule 24 of the Rules of Civil Procedure, the Interstate Commerce Commission moves for leave to intervene as a party defendant in this action in order to assert the claims and defenses which it deems necessary in support of its action, on the ground that it is entitled to

intervene on its own motion and as of right (28 U.S.C. 2323).

Interstate Commerce Commission, Robert W. Ginnane, General Counsel, H. Neil Garson, Assistant General Counsel

[fol. 47] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 48] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ORDER ALLOWING INTERVENTION OF INTERSTATE COMMERCE COMMISSION AS DEFENDANT—April 13, 1956

The Court having considered the motion of the Interstate Commerce Commission for leave to intervene as a party defendant in the above cause, and it appearing to the Court that the said Interstate Commerce Commission should be permitted to intervene as prayed, and the Court being duly advised in the premises,

It is ordered, That the Interstate Commerce Commission have leave to intervene in this cause and is hereby made a party defendant, and to that end may file its answer and hereafter defend its order involved herein in the same manner and with like effect as if named as an original party.

Dated, April 13, 1956.

/s/ Joe Ingraham, United States District Judge

[fol. 49] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT—Filed April 13, 1956

The Interstate Commerce Commission, hereinafter referred to as the Commission, for answer to the complaint says:

1.

Answering paragraph I, the Commission admits that plaintiffs seek to set aside, annul and suspend the orders of the Commission complained of, except that it avers that the Court is without jurisdiction to review the orders of the Commission in said paragraph.

2.

Admits the allegations of paragraph II.

3.

Admits the allegations of paragraph III.

4.

Answering paragraph IV, the Commission is without knowledge as to the truth of the allegations contained therein regarding the transportation by barge of commodities in single or interline service between the areas designated therein. Therefore, it neither admits nor denies said al-
[fol. 50] legations. The Commission avers that so much of paragraph IV, which alleges that the transportation of pipe between such areas is an important part of plaintiffs' traffic and revenue, is argumentative in nature to which no answer is required.

5.

Admits that Fourth Section Application No. 31120 was filed with the Commission on or about September 16, 1955, that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to become effective on October 26, 1955; that plaintiffs and interested parties filed petitions for suspension of the rate schedules and to deny Fourth Section relief; that responses were filed thereto by interested rail carriers; that the matter of the protest against the rates was referred to the Board of Suspension of the Commission and the application for relief was referred to the Fourth Section Board of the Commission; that the Commission entered the orders reproduced as Exhibits 1 and 2 to the complaint; that on or about October 26, 1955, interested rail carriers filed petitions for reconsideration by the Commission of the order of the Board of Suspension entered October 20, 1955, and for immediate issuance of the authorities sought in Fourth Section Application No. 31120; and that a reply was filed by Waterways Freight Bureau.

The Commission denies each and every allegation contained in paragraph V not admitted hereinabove.

6.

Admits that the Commission, Division 2, acting as an appellate division, entered the order of December 7, 1955, vacating the order of the Board of Suspension of October 20, 1955, in I. & S. No. 6491, insofar as the rate schedules therein were suspended. The Commission avers that said order of December 7, 1955, continued in full force and effect [fol. 51] that portion of the order of the Board of Suspension requiring an investigation of the rate schedules. The Commission further avers that a corrected order was entered, bearing the same date, further setting forth fully the reasons for vacating its prior order of suspension entered October 20, 1955. The Commission admits the entry of an order on December 9, 1955, in Fourth Section Application No. 31120, except that it avers that a corrected order of the same date has been entered setting forth that the action was taken by the Commission, Division 2, acting as an appellate division.

The Commission denies each and every allegation not admitted above.

7.

Denies the allegations of paragraph VII, except that it admits the filing of the petition mentioned in said paragraph.

8.

Denies the allegations of paragraph VIII, except that it admits the issuance of the notices reproduced as Exhibits 5 and 6 to the complaint. The Commission further denies that it issued the notice reproduced as Exhibit 5 on December 5, 1955. The Commission avers that said notice was issued on December 15, 1955.

9.

Denies the allegations of paragraph IX.

10.

Admits so much of paragraph X which quotes the provisions of Section 4(1) of the Interstate Commerce Act (49 U.S.C. Sec. 4(1)). The Commission avers that the other allegations of paragraph X are argumentative in nature to which no answer is required.

[fol. 52] 11.

Admits so much of paragraph XI which quotes sections of the Commission's orders reproduced as Exhibit 3 and Exhibit 1 of the complaint. The Commission denies each and every other allegation of this paragraph.

The Commission avers that a corrected order entered December 7, 1955, sets forth fully the reasons for vacating the order of suspension.

12.

Denies the allegations of paragraph XII.

Except as expressly admitted herein, the Commission denies each and all of the allegations in said complaint to

the extent that they are inconsistent with the averments of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By: H. Neil Garson, Assistant General Counsel.

Robert W. Ginnane, General Counsel, Of Counsel.

[fol. 53] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 54] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT TO THE COMPLAINT OF JOE D. HUGHES, INC., ET AL.—Filed April 13, 1956

The Interstate Commerce Commission, one of the defendants in the above-styled proceeding, for answer to the complaint filed by Joe D. Hughes, Inc., et al, intervening complainants, states:

1.

Admits the allegations of paragraph II.

2.

Answering paragraph IV, the Commission is without knowledge as to the truth of the allegations contained therein regarding the transportation by motor carrier of pipe between the areas designated therein. Therefore, it neither admits nor denies said allegations. The Commission avers that so much of paragraph IV which alleges that the transportation of pipe between such areas is an important part of intervening complainants' traffic and revenue, is argumentative in nature to which no answer is required.

3.

Admits the allegations of paragraph V.

[fol. 55] 4.

The Commission adopts by reference, pursuant to Rule 10(c) of the Federal Rules of Civil Procedure (28 U.S.C.A. Sec. 10(c)), the answers set forth in its answer to the plaintiffs' complaint not hereinabove specifically replied to.

Interstate Commerce Commission, By: H. Neil Garson, Assistant General Counsel.

Robert W. Ginnane, General Counsel, Of Counsel.

[fol. 56] Certificate of Service (omitted in printing)

[fol. 57] [File endorsement omitted]

In United States District Court for the Southern District of Texas, Houston Division

[Title omitted]

Answer of the United States of America to Complaint—Filed April 13, 1956

Comes now the defendant, the United States of America, and for its answer to the complaint filed in the above-entitled cause, admits, denies and avers as hereinafter set forth:

1. Denies the allegations of Paragraph I of the complaint.

2. Answering the allegations of Paragraph II of the complaint, the defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore neither admits nor denies the same.

3. Answering the allegations of Paragraph III of the complaint, the defendant respectfully refers the Court to

Section 2322 of Title 28, United States Code, for an accurate statement of the provisions of said Section 2322.

4. Answering the allegations of Paragraph IV of the complaint, the defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and therefore neither admits nor denies the same.

[fol. 58] 5. Answering the allegations of Paragraph V of the complaint, the defendant admits that Fourth Section Application 31120 was filed with the Interstate Commerce Commission on or about September 16, 1955, that Supplement 43 to Agent Kratzmeir's I.C.C. 4116 and Agent Hinsch's I.C.C. 4615 was published to be effective October 26, 1955; that plaintiffs and interested parties filed petitions for suspension of the rate schedules and to deny Fourth Section relief; that responses were filed thereto by interested rail carriers; that the matter of the protest against the rates was referred to the Board of Suspension of the Commission and the application for relief was referred to the Fourth Section Board of the Commission; that the Commission entered the orders reproduced as Exhibits 1 and 2 to the complaint; that on or about October 26, 1955, interested rail carriers filed petitions for reconsideration by the Commission of the order of the Board of Suspension entered October 20, 1955, and for immediate issuance of the authorities sought in Fourth Section Application No. 31120; and that Waterways Freight Bureau filed a reply document.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph V of the complaint.

6. Answering the allegations of Paragraph VI of the complaint, the defendant admits that the Interstate Commerce Commission issued the orders reproduced as Exhibits 3 and 4 to the complaint herein. Further answering the allegations of said Paragraph VI of the complaint, the defendant avers that a corrected order of December 7, 1955, was issued by the Interstate Commerce Commission, Division 2, acting as an Appellate Division, wherein the reasons for vacating its order, by the Board of Suspension, of October

20, 1955, in Investigation and Suspension Docket No. 6491, are more fully set forth. Further answering the allegations of said Paragraph VI of the complaint, the defendant avers that a corrected order of December 9, 1955, was issued by the Interstate Commerce Commission, Division 2, acting [fol. 59] as an Appellate Division, setting forth that the action was taken by the Commission, Division 2, acting as an Appellate Division.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VI of the complaint.

7. Answering the allegations of Paragraph VII of the complaint, the defendant admits that certain petitions were tendered to the Interstate Commerce Commission seeking reconsideration or review of appellate action of Division 2 of the Commission.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VII of the complaint.

8. Answering the allegations of Paragraph VIII of the complaint, the defendant admits that the Interstate Commerce Commission issued certain notices reproduced as Exhibits 5 and 6 to the complaint, but denies that the notice reproduced as Exhibit 5 was dated December 5, 1955, as alleged by plaintiffs.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph VIII of the complaint.

9. Denies the allegations of Paragraph IX of the complaint.

10. Answering the allegations of Paragraph X of the complaint, the defendant respectfully refers the Court to Section 4(1) of Title 49, United States Code, for a full and accurate statement of the provisions of said Section. As to all other allegations of said Paragraph X of the Complaint, the defendant avers that they are argumentative, irrelevant, immaterial, include conclusions of law and fact, and require no answer, but; to the extent that they may include facts which may require an answer, they are denied.

11. Answering the allegations of Paragraph XI of the complaint, the defendant admits the accuracy of the quoted extracts from the orders referred to therein. Further answering the allegations of said Paragraph XI of the complaint, the defendant avers that a corrected order of December 7, 1955, was issued by the Interstate Commerce Com- [fol. 60] mission, Division 2, acting as an Appellate Division, wherein the reasons for vacating its order, by the Board of Suspension, of October 20, 1955, in Investigation and Suspension Docket, No. 6491, are more fully set forth.

Except as hereinabove expressly admitted, the defendant denies the allegations of said Paragraph XI of the complaint.

12. Answering the allegations of Paragraph XII of the complaint, the defendant denies that the Interstate Commerce Commission has acted arbitrarily and capriciously, and contrary to any applicable statute. Further answering the allegations of said Paragraph XII of the complaint, the defendant avers that all other allegations therein are argumentative, include conclusions of law and fact, and require no answer.

13. The defendant further avers that the orders and actions of the Interstate Commerce Commission here under attack are valid and lawful in all respects, and denies each and every allegation to the contrary set forth in the complaint; and, except as herein expressly admitted, the defendant denies each and all of the allegations in the complaint.

WHEREFORE, having fully answered, the defendant, the United States of America, prays that the relief sought in the complaint be denied and that the complaint be dismissed with costs assessed against the plaintiffs, and it have such other, further and different relief as to the Court may seem just and equitable in the premises.

/s/ James E. Kilday, /s/ John H. Earle, Attorneys, Department of Justice.

Stanley N. Barnes, Assistant Attorney General, Malcolm R. Wilkey, United States Attorney, Attorneys for Defendant, United States of America, By: Gordon Kroll, Ass't U. S. Atty.

[fol. 61] CERTIFICATE OF SERVICE (omitted in printing)

[fol. 62] IN UNITED STATES DISTRICT COURT

NOTICE OF SETTING OF HEARING FOR MAY 18, 1956

Houston, Texas, April 13, 1956

Dixie Carriers, Inc. et al. v. United States, et al. C. A. 9544, Houston Division.

To ALL COUNSEL OF RECORD:

The above entitled and numbered cause will be heard in the courtroom at Houston, Texas, before Circuit Judge Brown and District Judges Hannay and Ingraham on Friday, May 18, 1956, at 10:00 A.M.

Briefs will be filed by all parties not later than Friday, May 11, 1956.

Parties Plaintiff will be allowed one hour and thirty minutes within which to present their arguments, and Parties Defendant will be allowed one hour and thirty minutes within which to present their arguments. Parties Plaintiffs and Defendants, respectively, will agree among themselves upon the division of time.

The court this day granted the motion of the Interstate Commerce Commission to intervene as a Party Defendant.

Yours very truly, V. Bailey Thomas, Clerk, By: /s/ Albert E. Anderson, Deputy Clerk.

[fol. 63] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, AMERICAN BARGE LINE COMPANY, UNION BARGE LINE CORPORATION, JOHN I. HAY COMPANY, COYLE LINES INCORPORATED, FEDERAL BARGE LINES, INC., WATERWAYS FREIGHT BUREAU, Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

OPINION—Filed July 31, 1956

Before BROWN, Circuit Judge, HANNAY and INGRAHAM, District Judges.

BROWN, Circuit Judge:

Involving the vacating of an Order suspending proposed rates, this case[1] is a parallel of *Amarillo-Borger Express* v. *United States* (N.D.Tex.-three-Judge), 138 F.Supp. 411, and the variation in *The Long Island Railroad Company* v. *United States* (E.D.N.Y.-three-Judge), 140 F.Supp. 823, expressly approving it. We too, without the necessity of restating the matter so fully developed there, adopt the opinion, conclusion and reasoning of that case. The only substantial factual difference is that here the proposed rates required express Section Four approval by the Commission under the Long and Short Haul provision, 49 USCA 4(1) of the National Transportation Act, 49 USCA 1 et seq.

[1] Complaint filed February 16, 1956, by eight specified, certificated Water Carriers and Waterways Freight Bureau to set aside orders of the Interstate Commerce Commission, 49 USCA 17(9); 28 USCA 1336, 1398, 2284, 2321 to 2325; and Section 10 of the Administrative Procedure Act, 5 USCA 1009.

The Railroads, to regain a competitive position lost to interstate Water and Motor Carriers largely as the result, they claimed, of voluntary *ex parte* increases (Ex Parte [fol. 64] 162, 166, 168, 175) in railroad rates, on September 19, 1955, published (to become effective October 26, 1955) drastic reductions in their rates for the movement of steel and wrought-iron pipe, in carloads, moving from the mills in the industrial areas East of the Mississippi River to destinations in the States of Arkansas, Louisiana, Oklahoma and Texas. Concealed in the lexicography of the complex tariff papers is the battle for transportation revenues running annually, it is asserted, from $6,000,000.00 to $9,000,000.00 and constituting about 15% of water carrier revenues for the movement of fabricated steel pipe for current and immediate use in the oil fields and for pipeline transmission facilities in the great Southwest.

This case does not involve the question of the extent of the right, so often asserted by the Railroads, as a part of management responsibility to publish reduced rates to meet competition, see *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, M.D.Ala., 104 F.Supp. 193, 198, and which would, subject only to the possibility of suspension for a seven months period under 49 USCA 15(7), make them effective until determined by hearing to be unlawful. For here, by the choice of the Railroads, the proposed rates were less for the longer distance from the steel mill areas to rail-head delivery points in the Southwest than rates for the movement of the same commodity for shorter distances within both origin and destination territories. They were thus confessedly in violation of the Act[2] *unless*, upon ap-

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[2] Sec. 4 [as amended June 18, 1910, February 28, 1920, August 9, 1935, September 18, 1940], 49 USCA 4: "'(1) It shall be unlawful for any common carrier subject to this part or Part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance • • •: *Provided*, That upon application to the Commission such common carrier may in *special cases, after investigation*, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; • • •,

plication and after investigation by the Commission finding it to be a special case, and the rates reasonably compensatory for the services performed, express approval were given.

[fol. 65] Consequently, as permitted by the Act, the Railroads simultaneously filed (September 19, 1955) Fourth Section Application No. 31120 for approval of the rates. But until the Fourth Section Application was granted, the rates could not go into effect. Conversely, so long as they were suspended, they could not be effective and approval under Fourth Section would be a sterile, useless academic decision.

Water and Motor Carriers then filed Protests against Fourth Section approval and Petitions for Suspension, each of which normally are administratively handled by separate Boards[3] of Commission employees. On October 20, 1955, the Suspension Board, on positive findings[4] iden-

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but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably compensatory* for the service performed; • • •." [Italics supplied]

[3] 49 USCA 17(2). The suspension proceeding was identified as I & S [Investigation and Suspension] Docket No. 6491. Fourth Section approval was under FSA 31120.

[4] The Order October 20, 1955, in 6491 stated (numbers in [ ] added to identify stated reasons for action):

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be [1] unjust and unreasonable in violation of the Interstate Commerce Act and [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and [3] be in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority • • •."

In two "corrected" orders later entered but bearing the same date occasioned by technical errors in tariff descriptions, the phrase "in contravention of the National Transportation Policy" was inadvertently omitted from finding [2] so that [2] read, "and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 • • •."

tical with *Amarillo-Borger*, supra, ordered an investigation into the lawfulness of the rates, and suspended them for the full seven months to May 25, 1956. With the rates suspended, there was nothing which the I & S Board could do on FSA 31120.

[fol. 66] The Railroads, presumably accepting the findings, note 4, supra, as an adequate, articulate "statement in writing of [the Commission's] reasons for such suspension" [5] since no complaint by them has yet been made, filed on October 26, 1955, a Petition in I & S 6491 for reconsideration of the suspension order and, on the same day, filed in FSA 31120 a "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application herein, dated September 16, 1955." This was not [6] a Peti-

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The Railroads (see their brief pages 31, 32, footnote 1) find significance in this omission, but the last "corrected" order of December 7, 1955, entered March 2, 1956, note 13, infra, restating the negative of findings [1], [2], and [3] completely dispels this.

[5] 49 USCA 15(7): "Whenever there shall be filed with the Commission any schedule stating a new • • • rate • • • the Commission shall have • • • authority • • • to enter upon a hearing concerning the lawfulness of such rate • • •; and pending such hearing and the decision thereon the (..ission, upon • • • delivering to the • • • carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such • • • rate • • • but not for a longer period than seven months beyond the time when it would otherwise go into effect • • •."

[6] No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, "Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491", it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to interested parties affected by it, 49 USCA 14(1)(2), 17(5); 5 USCA 1002, which was not done.

The Railroads' Petition FSA 31120 itself reflects this: "As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • •" [Emphasis supplied]

tion for reconsideration and those preparing and proposing it treated it as a Petition for initial action on the original Fourth Section Application.

[fol. 67] Through Commission administrative channels the Petition for Reconsideration of the Suspension Order came before Division 2 acting as an appellate division. On December 7, 1955, by an Order[7] in all respects identical with that roundly condemned in *Amarillo-Borger*, supra, the Suspension Order was vacated, and on December 9, 1955, an order of ambiguous[8] origin was entered granting temporary Fourth Section relief effective December 17, 1955.

[fol. 68] The Water and Motor Carriers then filed separate Petitions for Reconsideration of the Orders of December 7 and 9 requesting in those Petitions the Stay

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The Prayer stated: "Wherefor- these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120."; and compare this with the document filed simultaneously in I & S 6491, denominated a "Petition • • • for Reconsideration" and opens, "Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for *reconsideration* of the Order of the Suspension Board • • •." [Emphasis supplied]

[7] I & S 6491, December 7, 1955: "*It further appearing*, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; *and good cause appearing therefor*: • • •" See note 6, Amarillo-Borger, 138 F. Supp. at 414, 415.

[8] The actual order, made on December 9, as served December 29, 1955, showed at its heading: "At a session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division • • •" but closed: "By the Commission, Fourth Section Board. Harold D. McCoy, Secretary."

A corrective order dated December 9, 1955, was entered March 2, 1956, after this case had been assigned to this Three-Judge Court. It deleted reference to the Fourth Section Board and substituted: "By the Commission, Division 2, acting as an Appellate Division."

By a still later order purporting to be entered December 16, 1955, but actually entered April 27, 1956, this was again changed by reciting that the order of December 9, 1955, was by Division 2 "acting as an Appellate Division, upon consideration of a petition by respondents requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section application No. 31120, • • • be reversed • • •."

granted by the Act[9] where the initial Order is handed down by a Board or Division. By notice dated December 15, 1955, the full Commission declined to act and on the following day, December 16, notice and order were issued[10] denying the Petitions in I & S 6491.

[fol. 69] Thus the matter stood when, on February 16, 1956, this verified complaint was filed. And on that record, we are of the clear opinion that the Order of December 7, vacating the prior suspension, is invalid. The simple phrase "and good cause appearing therefor" is inadequate to upset prior positive findings, and for the reasons[11] set forth in

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[9] 49 USCA 17(8): "Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

[10] The notice, December 15, 1955, is captioned I & S 6491 and refers to "Petitions * * * seeking reconsideration * * * by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension." This was merely a ruling that the Petitions would be considered by the appropriate appellate division pursuant to Item 8.4 Organization Minutes of the Commission 20 Fed. Reg. 5031, 5035, and Rule 101(g).

The notice, December 16, and formal order of the same date likewise refer solely to I & S 6491 and the order, December 7, 1955, vacating the prior order, October 20, 1955, suspending the rates.

[11] The Court summed it up this way 138 F. Supp. at pages 417 and 420:

> "But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, 'and good cause appearing therefor.'
>
> "If the cryptic phrase 'good cause appearing' is a sufficient indication of action, it will be a self-generating bar to any

Amarillo-Borger cannot, on judicial review,[12] stand.

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review since, 'the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based,' Securities and Exchange Comm. v. Chenery Corp., 318 U. S. 80, 63 S. Ct. 454, 459, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a 'lack of the basic or essential findings required to support the Commission's order,' State of Florida v. United States, 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; United States v. Baltimore & Ohio R. Co., 293 U. S. 454, 465, 55 S. Ct. 268, 79 L. Ed. 587; Alabama Great Southern R. Co. v. United States, 340 U. S. 216, 224, 71 S. Ct. 264, 95 L. Ed. 225; Cantlay & Tanzola, Inc. v. United States (D. C. S. D. Calif.) (three-Judge), 115 F. Supp. 72; State of North Carolina v. United States, 325 U. S. 507, 65 S. Ct. 12, 60, 89 L. Ed. 1760; Atlanta & St. Andrews Bay Ry. Co. v. United States, D.C., 104 Fed. Supp. 193; Pacific Island Tariff Bureau v. United States, D.C., 129 Fed. Supp. 472. • • •

"What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase 'good cause appearing' to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then; without more than the magic phrase 'good cause appearing,' determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor.'"

[fol. 70]

[12] To similar attacks made here, as there, the following may be added to *Amarillo-Borger's* exposition:

(a) Competitors immediately, adversely and financially affected have standing to sue as parties for a review: note 9, *Amarillo-Borger* and Scripps-Howard Radio v. Federal Communications Commission, 316 U. S. 4, 14, 15, 86 L. Ed. 1229, 1236, 1237; National Coal Association v. Federal Power Commission, D.C. Cir., 191 F. 2d 462, 464-466; Associated Indus-

[fol. 71] Nor, do we think, does the matter stand differently

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tries v. Ickes, 2 Cir., 134 F. 2d 694, 699-704; Cia. Mexicana de Gas v. Federal Power Commission, 5 Cir., 167 F. 2d 804, 805.

(b) An Order vacating suspension has adequate finality for review: see, *Amarillo-Borger*, 138 F. Supp. at 420, syllabus 10, 11; Atlantic Seaboard Corp. v. Federal Power Commission, 4 Cir., 201 F. 2d 568; Phillips Petroleum Company v. Federal Power Commission, 10 Cir., 227 F. 2d 470; for reviewability is determined by the intrinsic nature of the order and its practical impact upon the business under regulation and not by the mere tag or label affixed to it: Columbia Broadcasting System v. United States, 316 U. S. 407, 86 L. Ed. 1563; Frozen Food Express v. United States, 351 U. S. 40, —— L. Ed. ——; United States v. Storer Broadcasting Company, 351 U. S. 192, —— L. Ed. ——.

(c) Administrative Procedure Act, 5 USCA 1001 et seq., applies to I.C.C. proceedings: *Amarillo-Borger*, supra, 138 F. Supp. at 417; Coyle Lines v. United States, E. D. La., 115 F. Supp. 272, 275; Atlanta and Saint Andrews Bay Railway Co. v. United States, 104 F. Supp. 193 at 200; Chicago & E. I. R. Co. v. United States, S. D. Ind., 107 F. Supp. 118, 124. Section 8 (5 USCA 1007) applies for suspensions and temporary approval of Fourth Section applications are integral parts of investigations on the lawfulness of rates which must, of course, be determined upon hearings, see, e.g., 49 USCA 15(1) "whenever, after a full hearing • • •"; 15(7) "• • • the Commission shall have authority • • • to enter upon a hearing concerning the lawfulness • • •"; so that, while prescribing rates is so-called "rule making" under Section 1 (5 USCA 1001), the substantive statutes requiring the hearing thereby invoke Section 4 (5 USCA 1003(b)) and Section 7 (5 USCA 1006). The Transportation Act likewise requires full adequate statement of Commission action, 49 USCA 14(1)(2); 17(5).

(d) That the granting or denial of suspensions requires the Commission to exercise sound judgment and discretion does not under Section 10, Administrative Procedure Act, 5 USCA 1009, class suspension orders as nonreviewable: *Amarillo-Borger*, supra, 138 F. Supp. at 418, note 13; commenting on the legislative history (summarized note 13, *Amarillo-Borger*), the Supreme Court stated, Heikkila v. Barber, 345 U. S. 229, 231, 97 L. Ed. 972, 976: "The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review • • •". The Court's purpose to apply the Administrative Procedure Act to reinvest in Courts the full power and responsibility of

because of subsequent efforts[13] of the Commission to indicate that it had in fact met the teachings of that case. This was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions. It was an attempt to substitute reasons where none had appeared[14] or been re- [fol. 72] corded. Moreover, we agree with *Long Island Railroad Company, supra,* 140 F.Supp. 823 at 828 (in which, at the very same time, March 1, 1956, a similar

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the Judiciary, Universal Camera Corporation v. National Labor Relations Board, 340 U. S. 474, 95 L. Ed. 456, is reflected in Shaughnessy v. Pedreiro, 349 U. S. 48, 51, 52, 99 L. Ed. 868, 873, declining to forbid judicial review under the 1952 Immigration Act: "Such a restrictive construction • • • would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action • • •. It is more in harmony with the generous review provisions of the Administrative Procedure Act • • •." "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed • • • ", Marcello v. Bonds, 349 U. S. 302, 310, 99 L. Ed. 1107, 1116; Air Line Dispatchers Association v. National Mediation Board, D.C. Cir., 189 F. 2d 685, 688, 689; Ford v. United States, 5 Cir., 230 F. 2d 533, 534.

[13] On March 2, 1956, a "corrected order" of December 7, 1955, in I & S 6491 was entered, substituting for the "and good cause appearing" paragraph of that original order, note 7, supra, the following (numbers in [ ] corresponding to the initial stated reasons, see note 4, supra, are added):

> "*It further appearing,* That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by [lists 5 protestants] thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not [1] result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or [3] be in contravention of the provisions of section 4 of the Interstate Commerce Act; • • •."

[14] The Minute Entry, Division 2, Appellate Division, I & S 6491, December 7, 1955, merely states: "Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation."

"corrected order" was entered), applying *Amarillo-Borger* that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate. We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of *nunc pro tunc* corrective orders, presumably "correct" the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the "and good cause appearing" technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else. There is no way to tell whether, in the processes of deliberation and adjudication, the Division meant "and good cause appearing" to be the negative of the initial suspension findings or something different. Whatever it was, "these suitors were justly entitled to a recital of what it was that indicated the disappearance of the prima facie case, and the necessity for an investigation, namely, that the announced result was the exercise of a discretion based upon sound reasoning", *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828.

The order of December 7, 1955, vacating the suspension must therefore be set aside, and the matter remanded to the Commission for further and not inconsistent proceedings. The question is not the simple one of a suspension beyond the statutory maximum of seven months (expired May 25, 1956) for this is all intertwined[15] with the Fourth

[15] It is plain that all of the action was interdependent. E.g., the initial oral hearing October 17, 1955, was before a joint session of the Suspension and Fourth Section Boards; the Fourth Section Application was in abeyance as long as the rates were suspended; and the order of December 7, 1955, whether considered as impliedly finding the negative of reason [3] of the Suspension Order (note 4, supra) or expressly doing so by the "corrected order" of March 2, 1956 (note 13, supra) in holding that said schedules would not "* * * be in contravention of the provisions of section 4 of the Interstate Commerce Act" was a statement patently wrong *unless* it was certain that such rates had been approved as a "special case" under 49 USCA 4.

Section Application. And rates which have been approved under the Fourth Section Application which would not, and could not, have been effectually determined so long as the rates were suspended, must resume their former status.

[fol. 73] That leads us to the plaintiffs' further contention that under these circumstances the Order of December 9, 1955, approving the Fourth Section Application is invalid. In this they contend that *temporary* approval (i.e., pending a hearing) is not authorized by the statute and is hence ineffective. But this is a point we need not decide.

As in the case of suspensions, we are not at this time claiming or exercising the existence of a power to determine whether the proposed rates were a "special" case meriting approval. We are concerned with the narrower, but still important, question of whether the procedures thus far followed by the Commission are in accordance with law.

Assuming, *arguendo,* that temporary relief may be granted and that the "investigation" required by Section 4 to permit that temporary relief need not be the full dress adversary hearing required before final determination of the lawfulness of the proposed rates, we think there must be some determination and disclosure of the basic reasons why temporary relief is granted. Unless this is done, there is no way for those immediately affected—e.g., "short haul" shippers who pay higher rates, intermediate communities, or competing carriers—[16] to ascertain whether

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[16] It would be unrealistic if, as claimed by the Railroads, competing carriers whose economic life is imperiled. Columbia Broadcasting System v. United States, supra; United States v. Storer Broadcasting Company, supra; Frozen Food Express v. United States, supra, have no standing to invoke review. They have ample standing, see note 12, supra; and at least two (see (2) and (3) of the criteria, Transcontinental Cases of 1922, 74 ICC 48, 71, which applicants must affirmatively meet to satisfy the underlying requirement of a "reasonably compensatory" rate expressly deal with the affect on competitors:

> "In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not to be so low as to threaten the

action having a devastating potential is the product of [fol. 74] reason and judgment within the mandate of the National Transportation Policy to "recognize and preserve the inherent advantages of each" mode of transportation and preserve a "national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States * * *" or is, on the other hand, hasty, ill-considered action creating undue and illegal preferences.

Nor is there any way for a Court on petition of any such interested and aggrieved parties to test its legality. So-called temporary approval is that in name only for, unlike suspensions which carry a statutory maximum, the Fourth Section approval may continue for many months or years until the investigation[17] hearings are completed and judicial review exhausted. So far as the affected competing carriers are concerned, the approval is a definite, positive act having final characteristics, *Phillips Petroleum Company* v. *Federal Power Commission, supra; Atlantic Seaboard Corporation* v. *Federal Power Commission, supra,*

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extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act. * * *"

[17] Hearings on the investigation ordered (and never rescinded) by the initial Suspension Order October 20, 1955, note 4, supra, were held early in 1956 and the matter is now awaiting an Examiner's proposed report. Control of timing and presentation at the various stages may be beyond the immediate parties since the matter was heard and is being considered on a consolidated record with cases of Steel Pipe—East to Southwest, Docket No. 31860 and FSA 31860. It may be further complicated since the proposed Fourth Section rates are constructed on the lowest barge and on-carrying motor truck tariffs, a substantial portion of which traffic now moves by motor carriers holding Oil Field Haulers' ICC permits so that, the plaintiffs assert, the ultimate action of the Commission in I & S 6491 may be affected by MCC 1891 General Investigation Oil Field Equipment, Materials, Supplies To and Between the Southwest, which likewise awaits Examiner's report. In either or all of these proceedings, the rules permit exceptions and appeal to the appropriate Division followed by exceptions and Petition for Reconsideration to the Full Commission. The parties, on argument, except to agree that the time would be substantial, were unable to estimate when the final order after final review would become final.

for even though the ultimate decision disapproves the rates and denies the Fourth Section Application, the traffic lost to them in the interim is irretrievable, and no means exists to recoup losses from shippers or the other carriers who have enjoyed the benefit of the Fourth Section rates. [fol. 75] This is in harmony with the philosophy of Section 4 that variations from its sweeping prohibitions are permitted, *Intermountain Rate Cases,* 234 U.S. 476, 58 L.Ed. 1408, only in *special* cases, and then only after investigation affords the basis for a conclusion that it is "special." Before the Commission can permit that which the statute forbids, at least two things must be reflected: (1) that it is a "special" case, and this means something more than a label as such; and (2) that its classification as a special case has been determined by "an investigation"—a very important condition since, "The requirement of section 4 that such authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing", *Louisville & N.R. Co.* v. *United States,* W.D. Ky (three-Judge), 225 Fed. 571, 580, affd. 245 U.S. 463, 62 L.Ed. 400; and see note 12(c), *supra.* For administrative action permissible only under limited circumstances after satisfying statutory conditions, it is plain that this is the type of situation which Congress had in mind in requiring that "all decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; * * *", Section 8, Administrative Procedure Act, 5 USCA 1007.

This is particularly so where, as here, by strong emphatic language condemning the rates for specific reasons (note [fol. 76] 4, *supra*) and generally as violative of the criteria of *Transcontinental Cases of 1922,* note 16, *supra,* relief is first denied but, without any other or further showing, is then granted. Courts and administrative agencies have, and must have, power to change their minds. But if it is the rule of law which controls, there must be some basis to indicate that it is reason and judgment that has brought about the change.

All of this is aggravated by the fact that this serious question of whether competing water and motor carriers are to be exposed to what they describe as "suicidal" rates for the indefinite period of investigation, has been treated too much as a matter of pure paper form. When the verified complaint and supporting memorandum brief filed here pointed out that these protestants were entitled, 49 USCA 17(8), note 9, *supra*, to a stay of the order of December 9, 1955, (stated to have been issued by the Fourth Section Board, note 8, *supra*) until decision by Division 2, the Commission on March 2, 1956, "corrected" that to make it appear that this was by Division 2 acting as an appellate division. But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of December 16 stating, contrary to available record facts (note 6, *supra*) that Division 2 was "acting as an appellate division, upon consideration of a petition by respondents [Railroads] requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 * * * be reversed * * * ."

The action of Division 2 was not appellate. It was initial. Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record does not change it. On the contrary, it dramatizes again the danger, under our system, of circumventing judicial review by claiming to find and then belatedly record that which was known in fact but imperfectly reflected in the official papers.

[fol. 77] The orders appealed from are, therefore, invalid and for the reasons set forth are set aside and the matter remanded to the Commission for further and not inconsistent proceedings.

Reversed and remanded to the Commission.

John R. Brown, United States Circuit Judge.
Allen B. Hannay, United States District Judge.
Joe Ingraham, United States District Judge.

[fol. 80] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

Civil Action No. 9544

DIXIE CARRIERS, INC., ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT—August 17, 1956
(Filed August 20, 1956)

BE IT REMEMBERED, that on May 18, 1956, in the above-entitled and numbered case wherein Dixie Carriers, Inc., Gulf Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureaus are Complainants; Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.-J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Line, Inc. are Intervening Complainants; the United States of America is Defendant; the Interstate Commerce Commission is Intervening Defendant, and the carriers by railroad listed in Appendix A of this Judgment are likewise Intervening Defendants, the trial upon its merits came on regularly to be heard before a Court of three Judges convened pursuant to law. All parties appeared by Counsel and the merits of the case were fully presented and the matter was submitted to the Court.

Thereafter, and on August 1, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed orders are invalid and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which [fol. 81] opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, by the Court that (1) the order of the Interstate Commerce Commission entered on December 7, 1955, in its Investigation and Suspension Docket No. 6491, and as subsequently amended by corrective order bearing the same date, and (2) the order of the Interstate Commerce Commission entered on December 9, 1955, responsive to Fourth Section Application No. 31120, identified as Twenty-Sixth Supplemental Fourth Section Order No. 17160, and as amended by corrective order bearing the same date, be, and the same are hereby, declared to be invalid, and said orders are hereby set aside and their enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the matter out of which the enjoined orders arose, be, and the same is hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings.

RENDERED AND DONE this 17 day of August 1956.

For the Court

/s/ John R. Brown, United States Circuit Judge
/s/ for Allen B. Hannay, United States District Judge
/s/ for Joe Ingraham, United States District Judge

APPROVED FOR ENTRY:

/s/ Donald Macleay, Attorney for Complainants
/s/ John C. Ridley, Attorney for Intervening Complainants
/s/ John H. Earle, Attorney for United States of America
/s/ H. Niel Garson, Attorney for Interstate Commerce Commission
/s/ Palmer Hutcheson, Jr., Attorney for Intervening Defendant Railroads.

[fol. 82] APPENDIX A TO JUDGMENT

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Sante Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company

[fol. 83] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERSTATE COMMERCE COMMISSION TO THE SUPREME COURT OF THE UNITED STATES—
Filed October 18, 1956

I.

Notice is hereby given that the Interstate Commerce Commission, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II.

The clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the record made before the Commission filed with the district court and the following:

(a) Complaint filed February 17, 1956 by Dixie Carriers, Inc., et al., plaintiffs, including the exhibits attached thereto;

[fol. 84] (b) Motion to intervene as plaintiffs filed by Joe D. Hughes, Inc., et al;

(c) Complaint filed by Joe D. Hughes, Inc., et al;

(d) Motion and notice of motion of the Atchison, Topeka and Santa Fe Railway Company, et al., for leave to intervene as defendant;

(e) Motion and notice of motion of the Interstate Commerce Commission for leave to intervene;

(f) Answer of the United States of America, defendant, to the intervening complaint;

(g) Answer of the Interstate Commerce Commission, intervening defendant, to the complaint;

(h) Answer of the Interstate Commerce Commission, intervening defendant, to the complaint of Joe D. Hughes, Inc., et al., intervening complainant;

(i) Answer of the Atchison, Topeka and Santa Fe Railway Company, et al., intervening defendant, to the complaint;

(j) Motion and notice of motion of Wabash Railroad Company for leave to intervene;

(k) Answer of Wabash Railroad Company, intervening defendant, to the complaint;

(l) Order of the court or docket entry allowing intervention of the Interstate Commerce Commission;

(m) Order of the court or docket entry allowing intervention of the Atchison, Topeka and Santa Fe Railway Company, et al;

(n) Order of the court or docket entry allowing intervention by the Wabash Railroad Company;

(o) Order or notice setting the case for trial on May 18, 1956;

(p) Opinion of the court filed July 31, 1956;

(q) Final judgment entered August 20, 1956;

(r) This notice of appeal.

[fol. 85] III.

The following questions are presented by this appeal:

1. Whether the Commission's order vacating the suspension is subject to judicial review?

2. Whether the Commission was required by Section 8 of the Administrative Procedure Act to make findings in support of its order vacating the suspension?

3. Whether the district court erred in enjoining the operation of the rate schedules after they had gone into effect, but prior to a final decision on their lawfulness by the Commission?

4. Whether the Commission is required to hold a hearing before granting fourth section relief?

5. Whether the Commission is required by Section 8 of the Administrative Procedure Act to make findings in support of its order granting temporary relief from the long and short haul provisions of Section 4 of the Interstate Commerce Act?

6. Whether competing carriers have standing to challenge orders of the Commission under Section 4?

/s/ Robert W. Ginnane, General Counsel, /s/ H. Neil Garson, Assistant General Counsel, Attorneys for Interstate Commerce Commission.

[fol. 86] Certificate of Service (omitted in printing).

[fol. 89] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY INTERVENING RAILROADS TO THE SUPREME COURT OF THE UNITED STATES— Filed October 18, 1956

I.

Notice is hereby given that the intervening railroad defendants, as listed in Appendix A attached hereto, hereby appeal to the Supreme Court of the United States from the final decree and judgment entered on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C., Sections 1253 and 2101(b).

II.

The Clerk is requested that there be included in the transcript of record for transmission to the Clerk of the Supreme Court the matters listed in notice of appeal filed by the Interstate Commerce Commission.

III.

The following questions are presented by this appeal:

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Did the District Court err in holding invalid, and restraining the enforcement of, an order vacating the

[fol. 90] suspension of rates, after such rates had gone into effect and prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Is the Interstate Commerce Commission required to hold a hearing before granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1)?

5. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1)?

6. Do competing carriers have standing to challenge orders issued by the Interstate Commerce Commission pursuant to 49 U.S.C., Section 4(1)?

7. Did the District Court err in holding invalid, and restraining the enforcement of, an order granting temporary relief from the prohibitions of 49 U.S.C., Section 4(1), after the rates involved had gone into effect and prior to a final Interstate Commerce Commission decision on whether to grant permanent relief?

8. Does the Interstate Commerce Commission have the power to correct an order after the validity of the original order has been challenged by court action?

/s/ Palmer Hutcheson, Hutcheson, Taliaferro & Hutcheson, 1720 Niels Esperson Bldg., Houston 2, Texas, Attorney for Intervening Railroad Defendants.

[fol. 91] Of Counsel:

Harvey Huston, 1211 Railway Exchange, Chicago 4, Illinois.

Richard J. Murphy, 1225 LaSalle Street Station, Chicago, Illinois.

Proof of Service (omitted in printing).

[fol. 93] APPENDIX A—LIST OF INTERVENING RAILROADS Omitted. Printed side page 82 ante.

[fol. 94] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

[Title omitted]

NOTICE OF APPEAL BY THE UNITED STATES OF AMERICA TO THE SUPREME COURT OF THE UNITED STATES—
Filed October 19, 1956

I.

Notice is hereby given that the United States of America, a defendant in the above-styled civil action, hereby appeals to the Supreme Court of the United States from the final judgment entered in this action on August 20, 1956.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101 (b).

II.

Intervenor Interstate Commerce Commission having previously filed a notice of appeal in which it requested the clerk of this Court to prepare for transmission to the Clerk of the Supreme Court of the United States a transcript of all parts of the record in this case which the United States believes to be pertinent to its appeal except this notice of appeal, the clerk is requested to transmit additionally to the Clerk of the Supreme Court this notice of appeal.

[fol. 95] III.

The following questions are presented by this appeal:

1. Whether the order of the Interstate Commerce Commission vacating the suspension is subject to judicial review.

2. Whether the Commission was required by Section 8 of the Administrative Procedure Act to make findings in support of its order vacating the suspension.

3. Whether the district court erred in enjoining the operation of the rate schedules after they had gone into effect, but prior to a final decision on their lawfulness by the Commission.

4. Whether the Commission is required to hold a hearing before granting relief pursuant to Section 4(1) of the Interstate Commerce Act.

5. Whether the Commission is required by Section 8 of the Administrative Procedure Act to make findings in support of its order granting temporary relief from the long and short haul provisions of said Section 4(1).

6. Whether competing carriers have standing to challenge orders of the Commission under Section 4(1).

/s/ Malcolm R. Wilkey, United States Attorney for the Southern District of Texas.

[fol. 96] Proof of Service (omitted in printing).

[fol. 107] Clerk's Certificate to Foregoing Transcript (omitted in printing).

[fol. 108] SUPREME COURT OF THE UNITED STATES

Nos. 647, 654 and 655, October Term, 1956

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., Appellants,

v.

DIXIE CARRIERS, INC., GULF-CANAL LINES, INC., MISSISSIPPI VALLEY BARGE LINE COMPANY, et al.;

UNITED STATES OF AMERICA, Appellant,

v.

DIXIE CARRIERS, INC., et al.; and,
INTERSTATE COMMERCE COMMISSION, Appellant,

v.

DIXIE CARRIERS, INC., et al.

APPEALS from the United States District Court for the Southern District of Texas.

ORDER NOTING PROBABLE JURISDICTION—March 25, 1957

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours allowed for oral argument.

Mr. Justice Whittaker took no part in the consideration or decision of these cases.

[fol. 109] PLAINTIFF'S EXHIBIT No. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. 9544

DIXIE CARRIERS, INC., et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTE OF EVIDENCE—NUMBER ONE

Plaintiffs offer, introduce and file in evidence the following copies of documents filed with the Interstate Commerce Commission in its proceeding under Fourth Section Application No. 31120 and Investigation and Suspension Docket No. 6491, certified by the Secretary of the said Commission:

1. Fourth Section Application No. 31120, dated September 16, 1955.
2. Amendment No. 1 to Fourth Section Application No. 31120, dated October 20, 1955.
3. Petition for Suspension filed by Waterways Freight Bureau, dated October 13, 1955.
4. Petition for Denial of Fourth Section Application filed by Waterways Freight Bureau, dated October 13, 1955. (Also attached to number 3 above as Exhibit A thereto.)
5. Petition for Suspension filed by Federal Barge Lines, Inc., dated October 13, 1955.
6. Protest and Application for Suspension filed by Brownsville Navigation District of Cameron County, Texas, and Port of Brownsville, dated October 13, 1955.

7. Petition for Suspension filed by Barge Service Corporation, dated October 10, 1955.

8. Protest and Petition for Suspension filed by Houston Barge Terminal Corporation, dated October 10, 1955.

9. Petition for Suspension and Denial of Fourth Section Application filed by American Iron and Machine Works Company and the Chamber of Commerce of Oklahoma City, Oklahoma, dated October 10, 1955.

[fol. 110] 10. Application of Hunsaker Trucking Contractor, Inc., et al, for Suspension and Denial of Fourth Section Application, dated October 10, 1955.

11. Petition for Suspension and Denial of Fourth Section Relief filed by Newtex Steamship Corporation, Pan-Atlantic Steamship Corporation and Seatrain Lines, Inc., dated October 13, 1955.

12. Petition for Suspension and Investigation filed by Nueces County Navigation District No. 1, Port of Corpus Christi, Texas, dated October 13, 1955.

13. Petition for Suspension filed by Houston Port Bureau, Inc., dated October 14, 1955.

14. Reply to Petitions for Suspension of Rates and Denial of Fourth Section Relief filed by Agent Kratzmeir for interested rail carriers, dated October 19, 1955.

15. Reply to Protests and Requests for Suspension and Investigation filed by Carter Oil Company, dated October 21, 1955.

16. Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Fourth Section Application No. 31120, dated October 26, 1955.

17. Petition of Railroad Respondents for Reconsideration by the Commission of the Order of the Suspension Board dated October 20, 1955, in I. & S. Docket No. 6491, dated October 26, 1955.

18. Reply to Petition of Railroads for Fourth Section Relief filed by Waterways Freight Bureau, dated November 5, 1955.

19. Reply to Railroads' Petition for Vacation of Order of Suspension Board filed by Waterways Freight Bureau, dated November 5, 1955.

20. Reply to Petition for Immediate Fourth Section Authority filed by Barge Service Corporation and Houston Barge Terminal Corporation, dated November 3, 1955.

21. Reply to Petition for Vacating of Suspension Order filed by Barge Service Corporation and Houston Barge Terminal Corporation, dated November 3, 1955.

22. Reply to Petition for Reconsideration of the Order of the Suspension Board and to Petition for Immediate Issuance of Authority Sought by Fourth Section Application No. 31120 filed by Brownsville Navigation District of Cameron County, Texas, and Port of Brownsville, dated November 3, 1955.

23. Reply to Petition for Reconsideration of the Order of the Suspension Board filed by Newtex Steamship Corporation, Pan-Atlantic Steamship Corporation and Seatrain Lines, Inc., dated November 2, 1955.

24. Reply to Petition for Reconsideration of Suspension Board Order and to Petition for Immediate Issuance of Fourth Section Authority filed by Hunsaker Trucking Contractor, Inc. et al, dated November 8, 1955.

25. Reply to Petition for Reconsideration of Order of Board of Suspension filed by American Iron and Machine Works and Oklahome City, Oklahoma, Chamber of Commerce, dated November 2, 1955.

26. Reply to Petitions of Railroads for Vacation of Suspension Order and Immediate Issuance of Fourth Section Relief filed by Federal Barge Lines, Inc., dated November 4, 1955.

[fol. 111] 27. Telegram dated November 8, 1955 from F. C. Kratzmeir to Secretary of the Interstate Commerce Commission.

28. Letter dated November 4, 1955 from Youngstown Sheet and Tube Company to Secretary of the Interstate Commerce Commission.

29. Letter dated November 4, 1955 from United States Steel Corporation to Interstate Commerce Commission.

30. Reply ot Sinclair Pipe Line Company to Petitions for Denial of Fourth Section Application and for Suspension, dated November 3, 1955.

31. Reply to Petitions for Relief filed by Waterways Freight Bureau, dated November 17, 1955.

32. Petition of Waterways Freight Bureau in I. & S. 6491 and FSA 31120 for Reconsideration of Orders effective December 17, 1955, Vacating Order of Suspension and Granting Fourth Section Relief, dated December 13, 1955.

33. Telegram dated December 13, 1955, from Attorney for Hunsaker Trucking Contractor, et al to Secretary of the Interstate Commerce Commission requesting reconsideration of the Commission's Order in I. & S. 6491 vacating suspension.

34. Letter dated December 13, 1955, from Attorney for Hunsaker et al to Secretary of the Interstate Commerce Commission, seeking reconsideration of Orders effective December 17, 1955.

35. Letter dated December 14, 1955, from Brownsville Navigation District of Cameron County, Texas and Port of Brownsville to Secretary of the Interstate Commerce Commission confirming telegraphic Petition for Reconsideration.

36. Telegram dated December 15, 1955, from Atlantic-Gulf Coastwise Steamship Freight Bureau petitioning for reconsideration of orders effective December 17, 1955.

37. Telegram dated December 15, 1955, from American Iron and Machine Works and Chamber of Commerce of Oklahoma City, Oklahoma, protesting vacation of Suspension Order.

38. Telegram dated December 15, 1955, from attorney for Santa Fe Ry., to Secretary of the Interstate Commerce Commission.

/s/ Alan S. Dale
Attorney for Plaintiffs.

[fol. 112] Secretary's Certificate (omitted in printing).

[fol. 113] (Handwritten—Recd. 9-19-55)
(Stamp—APR 25 '56 2588)

Fourth Section Application - (Commission's No. 31120
(Southwestern
(Freight Bureau No. B-6115

St. Louis, September 16, 1955
Pro. 71340-2

Steel or wrought iron pipe and related articles, from points in official (including Illinois), Southern Freight Association and Western Trunk Line territories to destinations in Arkansas, Louisiana (West of the Mississippi River), Missouri, New Mexico, Oklahoma and Texas.

[fol. 114] Fourth Section Application S.W.F.B.
No. B-6115—Page 30.

Certificate of Service

I hereby certify that I have this day served the foregoing document on the following parties by forwarding a true copy to each via 1st Class, prepaid U.S. Mail:

Union Barge Line Corporation,
Dravo Building,
5th & Liberty Aves.,
Pittsburgh 22, Pa.

Mr. J. G. Hartmann, TM,
Federal Barge Lines,
New Orleans 12, La.

Mr. W. Y. Wildman, Attorney,
Waterways Freight Bureau,
310 South Michigan Avenue,
Chicago 4, Ill.

Mr. L. L. Leonard, TM,
Sioux City & New Orleans Barge
Lines, Inc.,
Board of Trade Building,
Kansas City, Mo.

Mr. M. C. Pearson, TM,
Mississippi Valley Barge Line Co.,
1017 Olive Street,
St. Louis 1, Mo.

Mr. Nuel Belnap,
Belnap & McAuliffe,
1 North LaSalle St.,
Chicago 2, Ill.

Mr. W. A. Kernan, Mgr., Rates and Divs.,
American Barge Line Company,
1030 East Market Street,
Jeffersonville, Ind.

John I. Hay Co.,
332 S. Michigan Ave.,
Chicago, Ill.

Gulf Canal Lines,
904 M. & M. Bldg.,
Houston, Tex.

/s/ F. C. Kratzmeir
F. C. Kratzmeir

[fol. 115] (Handwritten—Filed 12/14/55)

Before the
INTERSTATE COMMERCE COMMISSION

I & S 6491
F.S.A. 31120

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

PETITION

for

RECONSIDERATION OF ORDERS
EFFECTIVE DECEMBER 17, 1955

VACATING ORDER OF SUSPENSION AND GRANTING
FOURTH SECTION RELIEF

ORAL ARGUMENT IS REQUESTED

WATERWAYS FREIGHT BUREAU[1]

Wesley A. Rogers,
Chairman

28 E. Jackson Blvd.
Chicago 4, Illinois
December 13, 1955

---

[1] Waterways Freight Bureau is organized under authority of the Commission extended under Section 5a of the Act. Its membership constitutes all the major common carriers by barge in the Mississippi River Basin system of inland connecting waterways, including the Louisiana-Texas-Florida Gulf Intracoastal waterway. The collective operations of these 18 companies account for some 95% of all such barge common carrier tonnage.

[fol. 116] PLAINTIFF'S EXHIBIT No. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

Houston Division

Civil Action No. 9544

DIXIE CARRIERS, INC., et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

NOTE OF EVIDENCE—NUMBER TWO

Plaintiffs offer, introduce and file in evidence the following copies of documents issued by the Interstate Commerce Commission in its proceedings under Fourth Section Application No. 31120, and Investigation and Suspension Docket No. 6491, certified by the Secretary of the said Commission:

1. Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served October 21, 1955.

2. Corrected Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served November 1, 1955.

3. Second Corrected Order of the Commission, Board of Suspension, dated October 20, 1955, in I. & S. Docket No. 6491, served November 8, 1955.

4. Action of the Commission dated November 25, 1955, in I. & S. Docket No. 6491 and FSA No. 31120, assigning the proceedings for hearing on January 24, 1956 in Houston, Texas, before Examiner Hanson, served November 25, 1955.

5. Order of the Commission, Division 2, dated December 7, 1955, in I. & S. Docket No. 6491, served December 13, 1955.

6. Corrected Order of the Commission, Division 2, dated December 7, 1955, in I. & S. Docket No. 6491, served March 2, 1956.

7. Order of the Commission, Division 2, dated December 9, 1955, entitled Twenty-Sixty Supplemental Fourth Section Order No. 17160, issued responsive to Fourth Section Application No. 31120, served December 29, 1955.

8. Corrected Twenty-Sixth Supplemental Fourth Section Order No. 17160, by the Commission, Division 2, dated December 9, 1955, served March 2, 1956.

[fol. 117] 9. Notice dated December 15, 1955, referring to I. & S. Docket No. 6491, served December 16, 1955.

10. Notice dated December 16, 1955, referring to I. & S. Docket No. 6491, served December 16, 1955.

11. Order of the Commission, Division 2, dated December 16, 1955, in I. & S. Docket No. 6491, served December 16, 1955.

12. Order of the Commission, Division 2, dated December 16, 1955, in I. & S. Docket No. 6491 and Fourth Section Application No. 31120, denying Petitions for Reconsideration, served April 27, 1956.

/s/ Alan S. Dale
Attorney for Plaintiffs.

[fol. 118] SECRETARY'S CERTIFICATE (omitted in printing).

[fol. 120] (Handwritten—Served 10-21-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except on page 6 thereof, ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and be in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 121] (Handwritten—Served 11-1-55)

CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new

rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On page 6 thereof, ITEM 360-C, and on page 2 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be

changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 122] (Handwritten—Served 11-8-55)

SECOND CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I.C.C. 4116 of F. C. KRATZMEIR, Agent, and
I.C.C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows:
On page 6 thereof, ITEM 360-C, and on pages 2 and 4 thereof all matter referring to ITEM 360-C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to

believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. MCCOY,
Secretary

(SEAL)

[fol. 123] (Handwritten—Served 11-25-55)
I&S No. 6491, ET AL TM:HA

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

NOVEMBER 25, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE—OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

The above-entitled proceedings are assigned for hearing on January 2', 1956, at 9:30 o'clock a.m., United States Standard Time, at the Federal Office Bldg., Franklin & Fannin Sts., Houston, Tex., before Examiner, Hanson.

The attention of the parties is directed to the General Rules of Practice, Rule 84(d), the provisions of which point to the desirability of interchange of exhibits and other pertinent material before the hearing.

By the Commission.

HAROLD D. McCOY,
Secretary

[fol. 124] (Handwritten—Served 12-13-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; and good cause appearing therefor:

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 125] (Handwritten—Served 3-2-56)

CORRECTED ORDER.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by Newtex Steamship Corp., filed November 3, 1955,

Brownsville Navigation District, filed November 4, 1955, Barge Service Corp., Youngstown Sheet & Tube Co., American Iron and Machine Co., Waterways Freight Bureau, filed November 7, 1955, thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not result in rates and charges, rules, regulations, or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or be in contravention of the provisions of section 4 of the Interstate Commerce Act; Therefore,

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary.

(SEAL)

[fol. 126] (Handwritten—Served March 2, 1956)

Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A. D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers

parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act; and upon further consideration of fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

> *It is further ordered,* That, upon the effective date of the rates as to which relief is hereinafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to

complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 127] (Handwritten—Served Dec. 29, 1955)

Twenty-sixth Supplemental Fourth Section Order
No. 17160

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A.D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratzmeir, Agent, for and on behalf of carriers parties to his tariff I.C.C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, upon the effective date of the rates as to which relief is hereinafter authorized,

and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120, applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided*, That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Fourth Section Board.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 128] (Handwritten—Served 12-16-55)

INTERSTATE COMMERCE COMMISSION
Washington

December 15, 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

NOTICE

This refers to certain petitions tendered herein seeking reconsideration or review by the Commission of appellate

action of Division 2 in which the Division modified the action of the Board of Suspension.

The said petitions will not be entertained for consideration by the entire Commission for the reason that this matter has been delegated to an appellate division and its action is not subject to review by the entire Commission. See item 8.4 of the Organization Minutes of the Commission, 20 Federal Register 5031, 5035.

The petitions will be considered by the appropriate appellate division for action as provided by Rule 101(g) of the Commission's General Rules of Practice.

HAROLD D. McCOY,
Secretary

[fol. 129] (Handwritten—Served 12-16-55)

INTERSTATE COMMERCE COMMISSION
Office of the Secretary
Washington, D. C.

December 16, 1955

NOTICE

Upon consideration of a petition filed by respondents requesting vacation of the order of suspension in I. and S. Docket No. 6491 dated October 20, 1955, the Commission in its order of December 7, 1955 concluded to vacate the order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved.

Several of the protestants filed petitions requesting the Commission to reconsider its action and to stay the order of December 7, 1955.

The Commission today has concluded that sufficient reasons have not been shown for staying the order of December 7, 1955 and the petitions making such request have been denied.

HAROLD D. McCOY,
Secretary

[fol. 130] (Handwritten—Served 12-16-55)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December, A. D., 1955

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated December 7, 1955 the Commission, Division 2, acting as an appellate division, upon consideration of a petition requesting that the order of suspension dated October 20, 1955 be vacated, and replies thereto, and good cause appearing therefor, concluded to vacate the order of suspension as of December 17, 1955, but continued the investigation of the schedules involved;

It further appearing, That several of the protestants have requested reconsideration of the action of Division 2 mentioned above, and that the order of vacation be stayed pending further consideration;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 7, 1955;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 131] (Handwritten—Served April 27, 1956)

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December, 1955.

INVESTIGATION AND SUSPENSION DOCKET No. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION No. 31120

STEEL AND WROUGHT PIPE TO THE SOUTHWEST

It appearing, That by an order dated December 9, 1955, the Commission, Division 2, acting as an appellate division, upon consideration of a petition by respondents requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section application No. 31120, Steel and Wrought Pipe to the Southwest, be reversed, and the order of suspension be vacated, and replies thereto, and for good cause appearing therefor, concluded to grant the relief prayed for in aforesaid application and to vacate the order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved;

It further appearing, That consideration has been given to petitions filed by several of the protestants requesting (1) reconsideration of the action of Division 2, acting as an appellate division, granting fourth section relief in the Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected), Iron and Steel Pipe to the Southwest, entered December 9, 1955, and that the order be stayed pending reconsideration; and (2) for oral argument in Fourth Section Application No. 31120 and Investigation and Suspension Docket No. 6491;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 9, 1955; and that oral argument is deemed to be unnecessary;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

HAROLD D. McCOY,
Secretary

(SEAL)

[fol. 132] PLAINTIFF'S EXHIBIT No. 3-(1)

[fol. 133] At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D.C., on the 21st day of October, A.D. 1955.

ROBERT NEWEL,)
R. R. SHERMAN,) Members of the Board.
R. H. LAWRY, JR.)

IRON AND STEEL PIPE TO THE SOUTHWEST.
FOURTH SECTION APPLICATION No. 31120

Voted to withhold relief pending hearing, and to assign the above application for hearing with I.& S. No. 6491.

[fol. 134] PLAINTIFF'S EXHIBIT No. 3-(2)

[fol. 135] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 7th day of December, A. D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

Upon consideration of petition requesting vacation of the order of suspension:

Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation.

[fol. 136] PLAINTIFF'S EXHIBIT No. 3-(3)

[fol. 137] At a Session of the INTERSTAT COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 9th day of December, A. D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

Twenty-sixth supplemental fourth-section order No. 17160, in fourth-section application No. 31120, Iron and Steel Pipe to the Southwest, approved and adopted.

[fol. 138] PLAINTIFF'S EXHIBIT No. 3-(4)

[fol. 139] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 16th day of December, A.D. 1955.

HOWARD G. FREAS,)
KELSO ELLIOTT,) Commissioners.
JOHN H. WINCHELL,)

PIPE—OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

Petitions of several protestants for reconsideration in the above-entitled proceeding denied.

[fol. 140] PLAINTIFF'S EXHIBIT No. 3-(5)

[fol. 141] At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D.C., on the 16th day of December, A.D. 1955.

HOWARD G. FREAS,
KELSO ELLIOTT,
JOHN H. WINCHELL, } Commissioners.

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST.
I.& S. 6491.

STEEL AND WROUGHT PIPE TO THE SOUTHWEST.

FOURTH SECTION APPLICATION No. 31120

Upon consideration of petitions filed by several of the protestants requesting (1) reconsideration of the action of Division 2, acting as an appellate division, granting fourth section relief in the Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected), Iron and Steel Pipe to the Southwest, entered December 9, 1955, and that the order be stayed pending reconsideration; and (2) for oral argument in Fourth Section Application No. 31120 and I.& S. Docket No. 6491:

Order in the above-entitled proceedings denying the said petitions approved and adopted.

SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 21 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 64760

DIXIE CARRIERS, INC., ET AL.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION, CIVIL ACTION NO. 9544.

JURISDICTIONAL STATEMENT.

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Attorneys for Railroad Defendants-Appellants.

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IN THE

Supreme Court of the United States

No. .....

DIXIE CARRIERS, INC., ET AL.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA, ET AL.,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.
CIVIL ACTION NO. 9544.

JURISDICTIONAL STATEMENT.

In compliance with Rules 13 and 15 of the Rules of the Supreme Court, The Atchison, Topeka and Santa Fe Railway Company and other intervening railroad defendants-appellants, as shown in Appendix A hereto attached, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW.

The opinion of the District Court is reported in 143 F. Supp. 844. The court's opinion and its final judgment are reproduced in Appendices B and C, respectively, hereto attached.

JURISDICTION.

This action was brought under Sections 1336, 1398, 2284, and 2321-2325 of Title 28, United States Code, Section 17(9) of Title 49, United States Code, and Section 1009 of Title 5, United States Code to set aside, annul, and suspend interlocutory orders of the Interstate Commerce Commission issued under Sections 4(1) and 15(7) of Title 49, United States Code. The judgment of the District Court was entered on August 20, 1956. Notice of appeal was filed in that court on October 18, 1956 by these defendants-appellants, and separate notices of appeal were filed also by the Interstate Commerce Commission and by the United States of America, defendants-appellants.

The jurisdiction of the Supreme Court to review this decision on direct appeal is conferred by Sections 1253 and 2101(b) of Title 28, United States Code, and is sustained by the following decisions: *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; and *American Trucking Assns.* v. *United States*, 344 U. S. 298.

STATUTES INVOLVED.

Sections 4(1), and 15(7) of the Interstate Commerce Act (49 U. S. C., Sections 4(1) and 15(7)); and Sections 8(b) and 10(e) of the Administrative Procedure Act (5 U. S. C., Sections 1007(b) and 1009(e)), are reproduced in Appendix D, hereto attached.

QUESTIONS PRESENTED.

1. Is an Interstate Commerce Commission order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates, subject to judicial review?

2. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, vacating a previously ordered suspension of such rates?

3. Did the District Court err in holding invalid, and restraining the enforcement of, an order vacating the suspension of rates, after such rates had gone into effect and prior to a final Interstate Commerce Commission decision on their lawfulness?

4. Is the Interstate Commerce Commission required to hold a hearing before granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1)?

5. Is the Interstate Commerce Commission required to make findings to support an order, issued pending a hearing and final decision on the lawfulness of rates, granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1)?

6. Do competing carriers have standing to challenge orders issued by the Interstate Commerce Commission pursuant to 49 U. S. C., Section 4(1)?

7. Did the District Court err in holding invalid, and restraining the enforcement of, an order granting temporary relief from the prohibitions of 49 U. S. C., Section 4(1), after the rates involved had gone into effect and prior to a final Interstate Commerce Commission decision on whether to grant permanent relief?

STATEMENT OF THE CASE.

On September 16, 1955, rail carriers participating in the movement of pipe from the East and the South to the Southwest published reductions in their rates, which reductions were scheduled to become effective October 26, 1955. At the same time the railroads filed with the Interstate Commerce Commission Fourth Section Application No. 31120 in which relief was sought from the applicability of the so-called "long and short haul" provisions of Section 4(1) (49 U. S. C. Sec. 4(1)) of the Interstate Commerce Act; the application in question was a necessary corollary in making the reduced rates effective.

Certain water carriers and motor carriers thereupon filed with the Commission requests for suspension of such rates, and for refusal of the "long and short haul" relief sought by the railroads, which in turn filed replies to said requests.

On October 20, 1955 the Commission, acting through its Board of Suspension, an employee group, entered an order suspending the effective date of the proposed rates to and including May 25, 1956, and instituting an investigation into the lawfulness of the rates, all of which action is authorized pursuant to Section 15(7) (49 U. S. C. Sec. 15(7)) of the Interstate Commerce Act. On October 21, 1955 the Commission, acting through its Fourth Section Board, also an employee group, voted to withhold long and short haul relief pending hearing.

Petitions seeking reconsideration of the order of suspension and for immediate issuance of fourth section relief were forwarded by the railroads to the Commission on October 26, 1955. Petitions in support of said petitions were filed by various shippers and receivers, and

replies in opposition were filed by water carrier and motor carrier interests. The Commission, acting through Division 2 as an appellate division, entered an order on December 7, 1955, to become effective December 17, 1955, vacating the order of suspension, but continuing the investigation of the new rates. On December 9, 1955, the Commission, again acting through Division 2 as an appellate division, entered an order granting fourth section relief until the effective date of the further order to be entered after hearing in Fourth Section Application No. 31120.

Thereafter, eight water carriers and the Waterways Freight Bureau, alleging "serious and irreparable injury" filed this action on February 19, 1956, seeking to have the court set aside, annul, and suspend the Commission's orders of December 7, 1955 and December 9, 1955. Several motor carriers intervened as plaintiffs and the Interstate Commerce Commission and several railroads intervened as defendants.

On August 1, 1956 the court filed its opinion (Appendix B, *infra*) and on August 20, 1956 entered its judgment (Appendix C, *infra*) holding the orders complained of to be invalid and restraining their enforcement.

THE QUESTIONS ARE SUBSTANTIAL.

The decision of the District Court constitutes an unwarranted intrusion into the orderly administration of freight rates by the Interstate Commerce Commission. The decision holds that interlocutory orders of the Commission, issued prior to the holding of formal hearings, must contain detailed findings of fact, and that the failure of the Commission so to amplify its interlocutory orders constitutes a fatal handicap to the validity of such orders.

The decision below is in conflict with the majority of

court decisions upon these and similar questions and fails to give proper effect to the decisions of this Court concerning the scope of the Administrative Procedure Act. Furthermore, the decision, if not reversed, would place formidable obstacles in the way of orderly administration of the Interstate Commerce Act. For example, according to the *69th Annual Report of the Interstate Commerce Commission*, for the period November 1, 1954 to October 31, 1955, the Commission handled 4,019 protested rate adjustments, resulting in 2,033 suspensions in full, 84 suspensions in part, 1,285 permitted to become effective, and 617 otherwise disposed of (protests withdrawn, etc.). Obviously, it would create an intolerable burden to cloak these proceedings with the degree of formality required by the decision below. Furthermore, for the same period, the Commission handled 1,421 applications for fourth section relief and in 90 instances issued orders granting temporary fourth section relief as it did by order of December 9, 1955, in the instant case; the decision below would require formal findings of fact in each instance in which temporary fourth section relief was granted, and impliedly, if not expressly, would not permit a grant of temporary relief prior to a formal hearing.

1. The decision below is at variance with the long accepted principle that preliminary administrative action, such as is involved herein—an order vacating a prior temporary rate suspension order, is not subject to judicial review until the prescribed administrative remedy has been exhausted. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-51; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 385. This principle has been applied consistently to the attempted judicial review of orders suspending rates. *Manhattan Transit Co.* v. *United States*, 24 F. Supp. 174 (D. C. Mass., 1938) (three-judge court); *Ferguson-Steere Motor Co.* v. *United*

States, 126 F. Supp. 588 (N. D. Tex., 1954) (three-judge court); *Humble Oil & Refining Co.* v. *Federal Power Commission*, 236 F. (2d) 819 (5th Cir., 1956). Interstate Commerce Commission orders refusing to suspend rates generally have been held not subject to judicial review without exhaustion of the administrative remedy. *M. C. Kiser Co.* v. *Central of Georgia Ry.*, 236 Fed. 573 (S. D. Ga., 1916), affirmed 239 Fed. 718 (5th Cir., 1917); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E. D. Va., 1935) (three-judge court); *Carlsen* v. *United States*, 107 F. Supp. 398 (S. D. N. Y., 1952) (three-judge court); *National Water Carriers Assn.* v. *United States*, 126 F. Supp. 87 (S. D. N. Y., 1954) (three-judge court).[1]

In the instant type of situation, involving an interlocutory order vacating a previous interlocutory order of suspension, the decisions are in conflict. The court below insists that exhaustion of the administrative remedy is not necessary, citing as authority *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N. D. Tex., 1956) (three-judge court), probable jurisdiction noted, 352 U. S. 817, and *Long Island R. R.* v. *United States*, 140 F. Supp. 823 (E. D. N. Y., 1956) (three-judge court). On the other hand, the unavailability of immediate judicial review of such orders is strongly indicated in the decisions in *Merchant Truckmen's Bureau* v. *United States*, 16 F. Supp. 998 (S. D. N. Y., 1936), and *Acme Fast Freight, Inc.* v. *United States*, 135 F. Supp. 823 (D. C. Del., 1955).

The court below apparently is of the view[2] that the

1. A decision apparently to the contrary, involving the Federal Maritime Board, is *Isbrandtsen Co.* v. *United States*, 211 F. (2d) 51 (App. D. C., 1954), cert. denied 347 U. S. 990.

2. The same views are expressed in *Amarillo-Borger Express* v. *United States, supra* (decision rendered by same Circuit Judge who rendered opinion in instant case), and in *Long Island R. R.* v. *United States, supra* (decided upon the authority of the *Amarillo-Borger Express* case).

Administrative Procedure Act permits judicial review generally of interlocutory administrative orders without first exhausting the prescribed administrative remedy, which remedy was not followed in the instant case, inasmuch as the Commission has not yet reached a decision, on the merits, as to the lawfulness of the involved rates. In this respect, the court below has ignored the interpretation of the Administrative Procedure Act by this Court in *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499-500, that:

> "That Act purports to strengthen, rather than to weaken, the principle requiring the exhaustion of administrative remedies before permitting court review."

In addition to its reliance upon the decision in *Amarillo-Borger Express* v. *United States, supra,* the court below has cited *Atlantic Seaboard Corp.* v. *Federal Power Commission,* 201 F. (2d) 568 (4th cir., 1953), and *Phillips Petroleum Co.* v. *Federal Power Commission,* 227 F. (2d) 470 (10th cir., 1955), cert. den. 350 U. S. 1005; in each case, however, the challenged order was beyond the statutory powers of the Commission; no such issue is present here.

2. The decision below held invalid an interim order of the Commission vacating a previous suspension order, and did so on the ground that the Commission failed to support its order with findings as required by Section 8(b) of the Administrative Procedure Act (5 U. S. C. Sec. 1007(b)) reproduced in Appendix D hereto. Section 8 of the Administrative Procedure Act is expressly limited by its own terms to

> "'* * * cases in which a hearing is required to be conducted in conformity with Section 7 * * *.'"

Section 7, in turn, relates to

> "'* * * hearings which Section 4 or 5 requires to be conducted pursuant to this section. * * *'"

Section 4 is concerned with rule making and Section 5 is restricted to

> "• • • every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. • • •"

The legislative history of the Administrative Procedure Act shows that Congress intended that the provisions of Section 8 should apply only to administrative orders issued after hearing. Thus, the Senate Committee Report of 1945 stated (p. 209):

> "Like section 7, upon which section 8 depends, this section is supplementary to sections 4 and 5 in cases in which agency action is required to be taken after hearing provided by statute and not otherwise excepted from the operation of sections 4 or 5."

(p. 194):

> "Sections 4 and 5 prescribe the basic requirements for the making of rules and the adjudication of particular cases. In each case, where other statutes require opportunity for an agency hearing, sections 7 and 8 set forth the minimum requirements for such hearings and the agency decisions thereafter, while section 11 provides for the appointment and tenure of examiners who may participate." (Senate Committee Report, 1945, S. Doc. 248, 79th Cong., 2d Sess.)

This Court has held that the requirements of Section 8(b) of the Administrative Procedure Act are applicable only in instances in which there is a statutory requirement of a hearing. *American Trucking Assns.* v. *United States*, 344 U. S. 298, 320.

Interim orders relating to the suspension of rates are not dependent upon the holding of a hearing. The Commission's powers relating to the suspension of rates are derived from Section 15(7) of the Interstate Commerce Act

(49 U. S. C. Sec. 15(7)), reproduced in Appendix D hereto, and which provides, in part that

> "* * * *pending such hearing* and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect. * * *" (Emphasis supplied.)

Since the holding of a hearing is not a necessary prerequisite to orders relating to the suspension of rates, such orders are not affected by Section 8(b) of the Administrative Procedure Act.

3. The District Court held invalid the Commission's interim order vacating the suspension of rates, and entered an order restraining the enforcement of the Commission's order after the involved rates had been in effect for several months and before the Commission had reached a final decision on the merits.

The court below, having concluded that the doctrine of exhaustion of administrative remedies was inapplicable to the interim order vacating the suspension of rates, and that the provisions of Section 8(b) of the Administrative Procedure Act required that such interim order contain "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues", also has found the interim order reviewable pursuant to Section 10(e) of the Administrative Procedure Act (5 U. S. C. Sec. 1009(e)), reproduced in Appendix D hereto. Section 10(e) of the Administrative Procedure Act authorizes reviewing courts to set aside agency action found to be "without observance of procedure required by law". However, the court below

lost sight of the fact that Section 10 of the Administrative Procedure Act, by its own terms, is inapplicable where "agency action is by law committed to agency discretion".

Administrative action by the Interstate Commerce Commission relating to the suspension of rates is an excellent example of agency action which is "committed to agency discretion" and which therefore is not subject to the provisions of Section 10 of the Administrative Procedure Act. Thus, in *Board of Railroad Commissioners* v. *Great Northern Ry.*, 281 U. S. 412, 429, it was stated:

> "This power of suspension was entrusted to the Commission only."

The District Court also overlooked the expression in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 130 F. Supp. 76, 78 (E. D. Mo., 1955) (three-judge court), affirmed 350 U. S. 892, wherein it was stated:

> "Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided."

The court below, in reliance upon inapplicable provisions of the Administrative Procedure Act, has interfered with the administrative discretion of the Interstate Commerce Commission, and by its judgment has, in effect, ruled that the involved rates should be suspended despite the fact that the Commission previously had ruled that the rates should not be suspended and would, at some time in the future, decide whether the involved rates were or were not lawful within the requirements of the Interstate Commerce Act.

4. Although the court below professed not to decide the point, its decision and the underlying reasoning strongly indicate that temporary fourth section relief can be granted

by the Commission only after a formal hearing. The court below, in the same manner in which it treated the question of the Commission's order vacating the suspension of rates, has concluded that Section 8(b) of the Administrative Procedure Act requires formal findings to support orders granting temporary relief from the provisions of Section 4(1) of the Interstate Commerce Act (49 U. S. C. Section 4(1)), reproduced in Appendix D hereto.

The District Court found Section 8(b) of the Administrative Procedure Act to be applicable upon the theory that temporary approval of fourth section relief applications is an integral part of an investigation on the lawfulness of rates which must be determined after a hearing. Although the court stated that it "need not decide" whether temporary fourth section relief prior to a hearing was permissible, elsewhere in the opinion the court referred to the language in Section 4(1) of the Interstate Commerce Act authorizing fourth section relief "after investigation" and quoted from a decision stating that the phrase "after investigation" implied a hearing. *Louisville & Nashville R. R.* v. *United States,* 225 Fed. 571 (W. D. Ky., 1915) (three-judge court); affirmed 245 U. S. 463. The question of whether a hearing must be held before temporary fourth section authority may be granted was not determined in the cited case, for the issue there was whether a final order of the Commission, issued after hearing, which denied, in part, fourth section relief, was valid.

There is no authority in support of the proposition that a formal hearing is a prerequisite to a grant of temporary fourth section relief. Nevertheless, there is substantial authority in support of the proposition that the requirement "after investigation" found in Section 4(1) of the Interstate Commerce Act does not require a formal hearing, and thus the Commission's order of December 9, 1955,

granting temporary fourth section relief until such time as the effective date of a final order after hearing, was not affected by Section 8(b) of the Administrative Procedure Act. In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 152, this Court held that a statutory direction to an administrative agency to "investigate" did not include the requirement of a formal hearing. To the same effect, see *Securities and Exchange Commission* v. *Torr*, 15 F. Supp. 144 (S. D. N. Y., 1936); *Woolley* v. *United States*, 97 F. (2d) 258, 262 (9th cir., 1938), cert. den. 305 U. S. 614; *Bowles* v. *Baer*, 142 F. (2d) 787, 788-789 (7th cir., 1944); *Genecov* v. *Federal Petroleum Board*, 146 F. (2d) 596, 598 (5th cir., 1945), cert. den. 324 U. S. 865.

Congress has not made a formal hearing a requirement before granting temporary fourth section relief. If that had been the intent of Congress, it could have explicitly provided for a hearing as it has done in other sections of the Interstate Commerce Act, such as Sections 1(14), (15), (21); 3(1a); 5(1), (2)(b), (7), (15); 13(3), (4); 15(1); (3), (6), (7), (13); 16(1); 19a(i); 20a(6). See *Jordan* v. *American Eagle Fire Insurance Co.*, 169 F. (2d) 281, 285-287 (App. D. C., 1948).

In addition, the practice of granting temporary fourth section relief without a hearing is not a recent development; for example, in 1939 the Commission authorized 328 grants of temporary authority, and did so in 295 instances in 1940 (Interstate Commerce Acts Annotated, Volume 11, S. Doc. 250, 77th Cong., 2d sess., p. 9164). In 1940, when Congress amended Section 4(1) of the Interstate Commerce Act (49 U. S. C. Section 4 (1)), the following proviso was added:

> "* * * *And provided further*, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission

under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice."

It is plain that the requirement of "one day's notice" implies that Congress intended prompt consideration of applications for fourth section relief, and the additional requirement of a hearing prior to granting temporary relief, and the necessary additional time required for such hearing, should not be implied. It should also be emphasized that Congress enacted the 1940 amendment, without the requirement of a hearing, in the face of the fact that the Commission regularly had been granting temporary fourth section relief without requiring hearings; surely Congress would have made specific requirement for hearings if that had been its intent.

5. The court below, having decided, at least by implication, that a formal hearing is a prerequisite to a Commission order granting temporary fourth section relief, held that said order was invalid because it did not contain the detailed findings of fact required by Section 8(b) of the Administrative Procedure Act. As pointed out in our discussion of Question 2 on appeal, Section 8(b) of the Administrative Procedure Act is not applicable unless a formal hearing is required, and in our discussion of Question 4 on appeal, we pointed out that an order granting temporary fourth section relief must be preceded only by an "investigation" and not necessarily by a "hearing". Therefore Section 8(b) of the Administrative Procedure Act is not applicable here.

6. The court below concluded that competing carriers have the right to bring court action to invalidate an order granting temporary fourth section relief.

In the instant case the fourth section relief was granted to, and at the request of, rail carriers, including these ap-

pellants. Requests for denial of such relief were made before the Commission by water carriers and motor carriers, and the plaintiffs in the court action are water carriers and motor carriers. The court below held that such competitive carriers, by reason of alleged threatened losses of traffic, had the right to seek judicial review of the grant of temporary fourth section relief.

In so holding, the court below, it is submitted, was not fully aware of the purposes and functions of the long and short haul provisions of the Interstate Commerce Act (49 U. S. C. Section 4 (1)). Proceedings under Section 4 are within the sole discretion of the Commission, and relate primarily to relationships between carriers, on the one hand, and shippers or receivers, on the other hand, rather than to relationships between groups of competing carriers.

In *United States* v. *Merchants & Manufacturers Traffic Assn.*, 242 U. S. 178, 188, in holding that a three-judge court had no power to restrain the enforcement of an order granting fourth section relief, this Court stated:

> "For the order is permissive merely. The carrier is the only necessary party to the proceedings under §4. The Commission represents the public. While it is proper and customary for communities or shippers interested to participate in hearings held, there is no provision for notice to them."

Algoma Coal & Coke Co. v. *United States*, 11 F. Supp. 487 (E. D. Va., 1935) (three-judge court), resembles the instant case strongly in that an injunction suit (brought by a shipper rather than by a competing carrier), attacked both the Commission's failure to suspend and its positive action in granting fourth section relief. In dismissing the action, the court stated (11 F. Supp. 492):

> "In the first place, it is to be noted that the only orders passed by the Commission were for fourth-sec-

tion relief and modification or suspension of existing rate orders of the Commission; and that these two orders are of themselves purely incidental to the main purpose of the proceeding before the Commission.

* * * * *

(495) "As has been pointed out, it is not shown that these two orders prejudicially affect the plaintiffs. What does affect them is the failure of the Commission to suspend the new rates. But this again was clearly within the administrative discretion of the Commission under Section 15(7) of the act. * * *"

So here, also, the plaintiffs were not directly affected by the order granting temporary fourth section relief; what really affected plaintiffs was the Commission's failure to suspend the new rates. If a shipper has no right to seek judicial review of an order granting fourth section relief, then *a fortiori* a competing carrier has no such right, even though the court below believes that competition for traffic affords a sufficient basis for such alleged right. The District Court's conclusion in this respect is not in harmony with the conclusion reached in *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 130 F. Supp. 76 (E. D. Mo., 1955) (three-judge court), affirmed 350 U. S. 892, in which it was held that competitive rail carriers had no standing to contest the validity of a Commission order permitting one motor carrier to acquire control of a second motor carrier. The court declared (130 F. Supp. 79):

"Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

7. The District Court held invalid the Commission's interim order granting temporary fourth section relief, and

entered an order restraining the enforcement of the Commission's order after the involved rates had been in effect for several months and before the Commission had reached a final decision on the merits of the issues under Section 4(1) of the Interstate Commerce Act.

As in the case of the interim order vacating the suspension of rates, the court found that the doctrine of exhaustion of administrative remedies was inapplicable, that the provisions of Section 8(b) of the Administrative Procedure Act required that such interim fourth section order contain detailed findings, and that the interim fourth section order was reviewable pursuant to Section 10(e) of the Administrative Procedure Act.

As in the case of orders involving suspension of rates, an interim order granting temporary fourth section relief is a matter committed to agency discretion by Section 4(1) of the Interstate Commerce Act and hence, Section 10(e) of the Administrative Procedure Act is, by its own terms, inapplicable. Thus, Section 4(1) of the Interstate Commerce Act provides that

> "* * * upon application to the Commission such common carrier may in special cases, after investigation, *be authorized by the Commission* to charge less for longer than for shorter distances for the transportation of passengers or property; and the *Commission may from time to time prescribe* the extent to which such designated common carrier may be relieved from the operation of this section. * * *" (Emphasis supplied.)

In analogous situations involving other types of interim permissive orders the courts have refused to interfere with the Commission's discretion. *Bowen Transports* v. *United States*, 116 F. Supp. 115 (E. D. Ill., 1953) (three-judge court) (involving a Commission order revoking temporary motor carrier operating authority prior to a decision on

the issue of permanent authority); *Koppers Co.* v. *United States*, 132 F. Supp. 159 (W. D. Pa., 1955) (three-judge court) (involving order permitting increase in rates prior to consolidated hearing on petition for reconsideration and complaint under Section 13 of the Interstate Commerce Act).

It is submitted that the court below erred in interfering with the Commission's discretion under Section 4(1) of the Interstate Commerce Act when the court, by its judgment, in effect ruled that the Commission should not grant temporary relief from the long and short haul provisions of the Act.

CONCLUSION.

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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December 13, 1956.

PROOF OF SERVICE.

I, Harvey Huston, one of the Attorneys for the Railroad Defendants-Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of December, 1956, I served copies of the foregoing Jurisdictional Statement on the several parties to the case as follows:

1. On Dixie Carriers, Inc. et al., plaintiffs, by mailing copies in duly addressed envelopes with air mail postage prepaid, to their attorneys of record, Donald Macleay and Francis W. McInerny, 1625 K Street, N. W., Washington 6, D. C.; Harry C. Ames and Harry C. Ames, Jr., Transportation Building, Washington 5, D. C.; T. S. Christopher, Continental Life Building, Fort Worth 2, Texas; Alan S. Dale, 212 Cotton Exchange Building, Houston 2, Texas; and (first class postage prepaid) Nuel D. Belnap, One North LaSalle Street, Chicago 1, Illinois.

2. On Joe D. Hughes, Inc., et al., intervening plaintiffs, by mailing a copy in a duly addressed envelope with air mail postage prepaid to their attorney of record, John C. Ridley, Niels Esperson Building, Houston, Texas.

3. On the United States of America, defendant, by mailing copies in duly addressed envelopes with air mail postage prepaid to the Solicitor General, Washington 25, D. C.; John H. Earle, Department of Justice, Washington 25, D. C.; and Gordon Kroll, Assistant United States Attorney, Houston, Texas.

4. On the Interstate Commerce Commission, intervening defendant, by mailing copies in duly addressed envelopes with air mail postage prepaid to Robert W. Ginnane, General Counsel, and H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

Harvey Huston

HARVEY HUSTON

APPENDIX A.

The Railroad Defendants-Appellants Are as Follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Texas,
Houston Division.

Dixie Carriers, Inc., Gulf-Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., Waterways Freight Bureau, *Plaintiffs*, *vs.* United States of America, *Defendant.*	Civil Action No. 9544.

Before BROWN, *Circuit Judge*, HANNAY and INGRAHAM, *District Judges*, BROWN, *Circuit Judge*:

Involving the vacating of an Order suspending proposed rates, this case[1] is a parallel of *Amarillo-Borger Express* v. *United States* (N. D. Tex.-three-Judge), 138 F. Supp. 411, and the variation in *The Long Island Railroad Company* v. *United States* (ED N. Y.-three-Judge), 140 F.

1. Complaint filed February 16, 1956, by eight specified, certificated Water Carriers and Waterways Freight Bureau to set aside orders of the Interstate Commerce Commission, 49 U. S. C. A. 17(9); 28 U. S. C. A. 1336, 1398, 2284, 2321 to 2325; and Section 10 of the Administrative Procedure Act, 5 U. S. C. A. 1009.

Supp. 823, expressly approving it. We too, without the necessity of restating the matter so fully developed there, adopt the opinion, conclusion and reasoning of that case. The only substantial factual difference is that here the proposed rates required express Section Four approval by the Commission under the Long and Short Haul provision, 49 USCA 4(1) of the National Transportation Act, 49 USCA 1 *et seq.*

The Railroads, to regain a competitive position lost to interstate Water and Motor Carriers largely as the result, they claimed, of voluntary *ex parte* increases (*Ex Parte* 162, 166, 168, 175) in railroad rates, on September 19, 1955, published (to become effective October 26, 1955) drastic reductions in their rates for the movement of steel and wrought-iron pipe, in carloads, moving from the mills in the industrial areas East of the Mississippi River to destinations in the States of Arkansas, Louisiana, Oklahoma and Texas. Concealed in the lexicography of the complex tariff papers is the battle for transportation revenues running annually, it is asserted, from $6,000,000.00 to $9,000,000.00 and constituting about 15% of water carrier revenues for the movement of fabricated steel pipe for current and immediate use in the oil fields and for pipeline transmission facilities in the great Southwest.

This case does not involve the question of the extent of the right, so often asserted by the Railroads, as a part of management responsibility to publish reduced rates to meet competition, see *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, M. D. Ala., 104 F. Supp. 193, 198, and which would, subject only to the possibility of suspension for a seven months period under 49 USCA 15(7), make them effective until determined by hearing to be unlawful. For here, by the choice of the Railroads, the proposed rates were less for the longer distance from the steel mill areas to rail-head delivery points in the Southwest than

rates for the movement of the same commodity for shorter distances within both origin and destination territories. They were thus confessedly in violation of the Act[2] *unless*, upon application and after investigation by the Commission finding it to be a special case, and the rates reasonably compensatory for the services performed, express approval were given.

Consequently, as permitted by the Act, the Railroads simultaneously filed (September 19, 1955) Fourth Section Application No. 31120 for approval of the rates. But until the Fourth Section Application was granted, the rates could not go into effect. Conversely, so long as they were suspended, they could not be effective and approval under Fourth Section would be a sterile, useless academic decision.

Water and Motor Carriers then filed Protests against Fourth Section approval and Petitions for Suspension, each of which normally are administratively handled by separate Boards[3] of Commission employees. On October

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2. Sec. 4 [as amended June 18, 1910, February 28, 1920, August 9, 1935, September 18, 1940], 49 U. S. C. A. 4: "(1) It shall be unlawful for any common carrier subject to this part or Part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance • • •: *Provided*, That upon application to the Commission such common carrier may in *special cases, after investigation*, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; • • •, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is *not reasonably compensatory* for the service performed; • • •." [Italics supplied].

3. 49 U. S. C. A. 17(2). The suspension proceeding was identified as I & S [Investigation and Suspension] Docket No. 6491. Fourth Section approval was under FSA 31120.

20, 1955, the Suspension Board, on positive findings[4] identical with *Amarillo-Borger, supra,* ordered an investigation into the lawfulness of the rates and suspended them for the full seven months to May 25, 1956. With the rates suspended, there was nothing which the I. & S. Board could do on FSA 31120.

The Railroads, presumably accepting the findings, note 4, *supra,* as an adequate, articulate "statement in writing of [the Commission's] reasons for such suspension"[5] since no complaint by them has yet been made, filed on October 26, 1955, a Petition in I. & S. 6491 for reconsideration of the suspension order and, on the same day, filed in FSA

4. The Order October 20, 1955, in 6491 stated (numbers in [ ] added to identify stated reasons for action):

"*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be [1] unjust and unreasonable in violation of the Interstate Commerce Act and [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy and [3] be in contravention of the provisions of Section 4 of the Interstate Commerce Act, without appropriate authority • • •."

In two "corrected" orders later entered but bearing the same date occasioned by technical errors in tariff descriptions, the phrase "in contravention of the National Transportation Policy" was inadvertently omitted from finding [2] so that [2] read, "and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 • • •."

The Railroads (see their brief pages 31, 32, footnote 1) find significance in this omission, but the last "corrected" order of December 7, 1955, entered March 2, 1956, note 13, *infra,* restating the negative of findings [1], [2], and [3] completely dispels this.

5. 49 U. S. C. A. 15(7): "Whenever there shall be filed with the Commission any schedule stating a new • • • rate • • • the Commission shall have • • • authority • • • to enter upon a hearing concerning the lawfulness of such rate • • •; and pending such hearing and the decision thereon the Commission, upon • • • delivering to the • • • carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such • • • rate • • • but not for a longer period than seven months beyond the time when it would otherwise go into effect • • •."

31120 a "Petition of Railroad Applicants for Immediate Issuance of the Authority Sought by Application herein, dated September 16, 1955." This was not[6] a Petition for reconsideration and those preparing and proposing it treated it as a Petition for initial action on the original Fourth Section Application.

Through Commission administrative channels the Petition for Reconsideration of the Suspension Order came before Division 2 acting as an appellate division. On December 7, 1955, by an Order[7] in all respects identical with that roundly condemned in *Amarillo-Borger, supra,* the Suspension Order was vacated, and on December 9, 1955,

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6. No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, "Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491", it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to interested parties affected by it, 49 U. S. C. A. 14(1)(2), 17(5); 5 U. S. C. A. 1002, which was not done.

The Railroads' Petition FSA 31120 itself reflects this: "As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • •" [Emphasis supplied].

The Prayer stated: "Wherefor these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120."; and compare this with the document filed simultaneously in I & S 6491, denominated a "Petition • • • for Reconsideration" and opens, "Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for *reconsideration* of the Order of the Suspension Board • • •." [Emphasis supplied.]

7. I & S 6491, December 7, 1955: "*It further appearing,* That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; *and good cause appearing therefor;* • • •" See note 6, Amarillo-Borger, 138 F. Supp. at 414, 415.

an order of ambiguous[8] origin was entered granting temporary Fourth Section relief effective December 17, 1955.

The Water and Motor Carriers then filed separate Petitions for Reconsideration of the Orders of December 7 and 9 requesting in those Petitions the Stay granted by the Act[9] where the initial Order is handed down by a Board or Division. By notice dated December 15, 1955, the full Commission declined to act and on the following day, December 16, notice and order were issued[10] denying the Petitions in I & S 6491.

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8. The actual order, made on December 9, as served December 29, 1955, showed at its heading: "At a session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division • • •" but closed: "By the Commission, Fourth Section Board. Harold D. McCoy, Secretary."

A corrective order dated December 9, 1955, was entered March 2, 1956, after this case had been assigned to this Three-Judge Court. It deleted reference to the Fourth Section Board and substituted: "By the Commission, Division 2, acting as an Appellate Division."

By a still later order purporting to be entered December 16, 1955, but actually entered April 27, 1956, this was again changed by reciting that the order of December 9, 1955, was by Division 2 "acting as an Appellate Division, upon consideration of a petition by respondents requesting that the action of the Fourth Section application No. 31120, • • • be reversed • • •."

9. 49 U. S. C. A. 17(8): "Where application for rehearing reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission."

10. The notice, December 15, 1955, is captioned I & S 6491 and refers to "Petitions • • • seeking reconsideration • • • by the Commission of appellate action of Division 2 in which the Division modified the action of the Board of Suspension." This was merely a ruling that the Petitions would be considered by

Thus the matter stood when, on February 16, 1956, this verified complaint was filed. And on that record, we are of the clear opinion that the Order of December 7, vacating the prior suspension, is invalid. The simple phrase "and good cause appearing therefor" is inadequate to upset

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the appropriate appellate division pursuant to Item 8.4 Organization Minutes of the Commission 20 Fed. Reg. 5031, 5035, and Rule 101(g).

The notice, December 16, and formal order of the same date likewise refer solely to I & S 6491 and the order, December 7, 1955, vacating the prior order, October 20, 1955, suspending the rates.

11. The Court summed it up this way 138 F. Supp. at pages 417 and 420:

"But these findings, decisive and significant in nature, made in scrupulous regard for statutory mandate were, by order of vacation, swept away without the slightest indication of the existence of facts, an adequate description of them, or even the barest statement of reasons underlying the Commission's change of heart. The propriety of its action, on the external record, must be tested under the simple, brief phrase, 'and good cause appearing therefor'.

"If the cryptic phrase 'good cause appearing' is a sufficient indication of action, it will be a self-generating bar to any review since, 'the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based,' Securities and *Exchange Comm.* v. *Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454, 459, 87 L. Ed. 626. It is precisely because the scope of judicial review is so narrowly limited, that administrative agencies must, in terms beyond the statutory rubric, reveal the basis for their action by which to judge whether it has met the elemental standards of our system and statutory requirements. A threshold decision by reviewing court therefore is whether there is a 'lack of the basic or essential findings required to support the Commission's order,' *State of Florida* v. *United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291; *United States* v. *Baltimore & Ohio R. Co.*, 293 U. S. 454, 465, 55 S. Ct. 268, 79 L. Ed. 587; *Alabama Great Southern R. Co.* v. *United States*, 340 U. S. 216, 224, 71 S. Ct. 264, 95 L. Ed. 225; *Cantlay & Tanzola, Inc.* v. *United States*, (D. C. S. D. Calif.) (three-Judge), 115 F. Supp. 72; *State of North Carolina* v. *United States*, 325 U. S. 507, 65 S. Ct. 12, 60, 89 L. Ed. 1760; *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, D. C., 104

prior positive findings, and for the reasons[11] set forth in *Amarillo-Borger* cannot, on judicial review,[12] stand.

Fed. Supp. 193; *Pacific Island Tariff Bureau* v. *United States*, D. C., 129 Fed. Supp. 472. • • •

"What we have said is certainly correct if it is assumed that the Commission intended its cryptic phrase 'good cause appearing' to wipe away all of its prior fact conclusions. It is all the more so if, as seems likely, the Commission intended that the balance of its order of September 23 calling for investigation of the rates to determine their lawfulness should remain in effect. In expressed terms the only change made by the subsequent order was to vacate the former so far as concerned suspension alone. It literally left in force the findings of unlawfulness, destructive competition, and then, without more than the magic phrase 'good cause appearing,' determined that what on September 23 led them to suspend now led them to unsuspend. The Commission may, as any other body, have the right to change its mind, but its action must demonstrate the 'reasons or basis therefor.'"

12. To similar attacks made here, as there, the following may be added to *Amarillo-Borger's* exposition:

(a) Competitors immediately, adversely and financially affected have standing to sue as parties for a review: Note 9, *Amarillo-Borger* and *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4, 14, 15, 86 L. Ed. 1229, 1236, 1237; *National Coal Association* v. *Federal Power Commission*, D. C. Cir., 191 F. 2d 462, 464-466; *Associated Industries* v. *Ickes*, 2 Cir., 134 F. 2d 694, 699-704; *Cia. Mexicana de Gas* v. *Federal Power Commission*, 5 Cir., 167 F. 2d 804, 805.

(b) An Order vacating suspension has adequate finality for review; see, *Amarillo-Borger*, 138 F. Supp. at 420, syllabus 10, 11; *Atlantic Seaboard Corp.* v. *Federal Power Commission*, 4 Cir., 201 F. 2d 568; *Phillips Petroleum Company* v. *Federal Power Commission*, 10 Cir., 227 F. 2d 470; for reviewability is determined by the intrinsic nature of the order and its practical impact upon the business under regulation and not by the mere tag or label affixed to it: *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 86 L. Ed. 1563; *Frozen Food Express* v. *United States*, 351 U. S. 40, .. L. Ed. ..; *United States* v. *Storer Broadcasting Company*, 351 U. S. 192, .. L. Ed. ...

(c) Administrative Procedure Act, 5 U. S. C. A. 1001 *et seq*, applies to I. C. C. proceedings: *Amarillo-Borger*, *supra*, 138 F. Supp. at 417; *Coyle Lines* v. *United States*, E. D. La., 115 F. Supp. 272, 275; *Atlanta and Saint Andrews Bay Railway Co.* v. *United States*, 104 F. Supp. 193 at 200; *Chicago & E. I. R. Co.* v. *United States*, S. D. Ind., 107 F.

Nor, do we think, does the matter stand differently because of subsequent efforts[13] of the Commission to indicate

Supp. 118, 124. Section 8 (5 U. S. C. A. 1007) applies for suspensions and temporary approval of Fourth Section applications are integral parts of investigations on the lawfulness of rates which must, of course, be determined upon hearings, see, *e.g.*, 49 U. S. C. A. 15(1) "whenever, after a full hearing • • •"; 15(7) "• • • the Commission shall have authority • • • to enter upon a hearing concerning the lawfulness • • •"; so that, while prescribing rates is so-called "rule making" under Section 1 (5 U. S. C. A. 1001), the substantive statutes requiring the hearing thereby invoke Section 4 (5 U. S. C. A. 1003(b)) and Section 7 (5 U. S. C. A. 1006). The Transportation Act likewise requires full adequate statement of Commission action, 49 U. S. C. A. 14(1) (2); 17(5).

(d) That the granting or denial of suspensions requires the Commission to exercise sound judgment and discretion does not under Section 10, Administrative Procedure Act, 5 U. S. C. A. 1009, class suspension orders as nonreviewable: *Amarillo-Borger, supra*, 138 F. Supp. at 418, note 13; commenting on the legislative history (summarized note 13, *Amarillo-Borger*), the Supreme Court stated, *Heikkila* v. *Barber*, 345 U. S. 229, 231, 97 L. Ed. 972, 976: "The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that §10 greatly expanded the availability of judicial review • • •". The Court's purpose to apply the Administrative Procedure Act to reinvest in Courts the full power and responsibility of the Judiciary, *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U. S. 474, 95 L. Ed. 456, is reflected in *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51, 52, 99 L. Ed. 868, 873, declining to forbid judicial review under the 1952 Immigration Act: "Such a restrictive construction • • • would run counter to §10 and §12 of the Administrative Procedure Act. Their purpose was to remove obstacles to judicial review of agency action • • •. It is more in harmony with the generous review provisions of the Administrative Procedure Act • • •." "Exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed • • •", *Marcello* v. *Bonds*, 349 U. S. 302, 310, 99 L. Ed. 1107, 1116; *Air Line Dispatchers Association* v. *National Mediation Board*, D. C. Cir., 189 F. 2d 685, 688, 689; *Ford* v. *United States*, 5 Cir., 230 F. 2d 533, 534.

13. On March 2, 1956, a "corrected order" of December 7, 1955, in I & S 6491 was entered, substituting for the "and good cause appearing", paragraph of that original order, note 7, *supra*,

that it had in fact met the teachings of that case. This was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions. It was an attempt to substitute reasons where none had appeared[14] or been recorded. Moreover, we agree with *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828 (in which, at the very same time, March 1, 1956, a similar "corrected order" was entered), applying *Amarillo-Borger* that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate. We do not regard this in a technical light at all. If administrative agencies, no matter how highly motivated their particular action may be, can, under the form of *nunc pro tunc* corrective orders, presumably "correct" the subject order to meet the objections specifically urged in a petition for judicial review, effective review would be denied. The vice of the "and good cause appearing" technique is that it affords nothing the parties or court can take hold of to scrutinize and measure as the basis for the action. That is compounded if, on a challenge, review is then thwarted by substituting something else. There is

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the following (numbers in [ ] corresponding to the initial stated reasons, see note 4 *supra,* are added):

"*It further appearing,* That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by [lists 5 protestants] thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not [1] result in rates and charges, rules, regulations or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or [2] constitute unfair and destructive competitive practices in contravention of the National Transportation Policy or [3] be in contravention of the provisions of Section 4 of the Interstate Commerce Act; * * *"

14. The Minute Entry, Division 2, Appellate Division, I & S 6491, December 7, 1955, merely states: "Voted to grant the petition to vacate the order of suspension but to continue the proceeding of investigation."

no way to tell whether, in the processes of deliberation and adjudication, the Division meant "and good cause appearing" to be the negative of the initial suspension findings or something different. Whatever it was, "these suitors were justly entitled to a recital of what it was that indicated the disappearance of the prima facie case, and the necessity for an investigation, namely, that the announced result was the exercise of a discretion based upon sound reasoning", *Long Island Railroad Company, supra,* 140 F. Supp. 823 at 828.

The order of December 7, 1955, vacating the suspension must therefore be set aside, and the matter remanded to the Commission for further and not inconsistent proceedings. The question is not the simple one of a suspension beyond the statutory maximum of seven months (expired May 25, 1956) for this is all intertwined[15] with the Fourth Section Application. And rates which have been approved under the Fourth Section Application which would not, and could not, have been effectually determined so long as the rates were suspended, must resume their former status.

That leads us to the plaintiffs' further contention that under these circumstances the Order of December 9, 1955, approving the Fourth Section Application is invalid. In this they contend that *temporary* approval (*i. e.*, pending a hearing) is not authorized by the statute and is hence ineffective. But this is a point we need not decide.

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15. It is plain that all of the action was interdependent. *E.g.* the initial oral hearing October 17, 1955, was before a joint session of the Suspension and Fourth Section Boards; the Fourth Section Application was in abeyance as long as the rates were suspended; and the order of December 7, 1955, whether considered as impliedly finding the negative of reason [3] of the Suspension Order (note 4, *supra*) or expressly doing so by the "corrected order" of March 2, 1956 (note 13, *supra*) in holding that said schedules would not "* * * be in contravention of the provisions of section 4 of the Interstate Commerce Act" was a statement patently wrong *unless* it was certain that such rates had been approved as a "special case" under 49 U. S. C. A. 4.

As in the case of suspensions, we are not at this time claiming or exercising the existence of a power to determine whether the proposed rates were a "special" case meriting approval. We are concerned with the narrower, but still important, question of whether the procedures thus far followed by the Commission are in accordance with law.

Assuming, *arguendo*, that temporary relief may be granted and that the "investigation" required by Section 4 to permit that temporary relief need not be the full dress adversary hearing required before final determination of the lawfulness of the proposed rates, we think there must be some determination and disclosure of the basic reasons why temporary relief is granted. Unless this is done, there is no way for those immediately affected—*e. g.*, "short haul" shippers who pay higher rates, intermediate communities, or competing carriers—[16] to ascertain whether action having a devastating potential is the product of reason and judgment within the mandate of the National

16. It would be unrealistic if, as claimed by the Railroads, competing carriers whose economic life is imperiled, *Columbia Broadcasting System* v. *United States, supra; United States* v. *Storer Broadcasting Company, supra; Frozen Food Express* v. *United States, supra,* have no standing to invoke review. They have ample standing, see note 12, *supra;* and at least two (see (2) and (3) of the criteria, Transcontinental Cases of 1922, 74 ICC 48, 71, which applicants must affirmatively meet to satisfy the underlying requirement of a "reasonably compensatory" rate expressly deal with the effect on competitors: "In the light of these and similar considerations, we are of the opinion and find that in the administration of the fourth section the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not to be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act. • • •"

Transportation Policy to "recognize and preserve the inherent advantages of each" mode of transportation and preserve a "national transportation system by water, highway and rail * * * adequate to meet the needs of the commerce of the United States * * *" or is, on the other hand, hasty, ill-considered action creating undue and illegal preferences.

Nor is there any way for a Court on petition of any such interested and aggrieved parties to test its legality. So-called temporary approval is that in name only for, unlike suspensions which carry a statutory maximum, the Fourth Section approval may continue for many months or years until the investigation[17] hearings are completed and judicial review exhausted. So far as the affected competing carriers are concerned, the approval is a definite, positive act having final characteristics, *Phillips Petroleum Company* v. *Federal Power Commission, supra; Atlantic Seaboard Corporation* v. *Federal Power Commission, supra,* for even though the ultimate decision disapproves the rates

17. Hearings on the investigation ordered (and never rescinded) by the initial Suspension Order October 20, 1955, note 4, *supra,* were held early in 1956 and the matter is now awaiting an Examiner's proposed report. Control of timing and presentation at the various stages may be beyond the immediate parties since the matter was heard and is being considered on a consolidated record with cases of Steel Pipe—East to Southwest, Docket No. 31860 and FSA 31860. It may be further complicated since the proposed Fourth Section rates are constructed on the lowest barge and on-carrying motor truck tariffs, a substantial portion of which traffic now moves by motor carriers holding Oil Field Haulers' ICC permits so that, the plaintiffs assert, the ultimate action of the Commission in I & S 6491 may be affected by MCC 1891 General Investigation Oil Field Equipment, Materials, Supplies To and Between the Southwest, which likewise awaits Examiner's report. In either or all of these proceedings, the rules permit exceptions and appeal to the appropriate Division followed by exceptions and Petition for Reconsideration to the Full Commission. The parties, on argument, except to agree that the time would be substantial, were unable to estimate when the final order after final review would become final.

and denies the Fourth Section Application, the traffic lost to them in the interim is irretrievable, and no means exists to recoup losses from shippers or the other carriers who have enjoyed the benefit of the Fourth Section rates.

This is in harmony with the philosophy of Section 4 that variations from its sweeping prohibitions are permitted, *Intermountain Rate cases*, 234 U. S. 476, 58 L. Ed. 1408, only in *special* cases, and then only after investigation affords the basis for a conclusion that it is "special." Before the Commission can permit that which the statute forbids, at least two things must be reflected: (1) that it is a "special" case, and this means something more than a label as such; and (2) that its classification as a special case has been determined by "an investigation"—a very important condition since, "The requirement of section 4 that such authorization shall be made, if at all, 'after investigation' clearly implies that the question shall be determined upon testimony and after a hearing", *Louisville & N. R. Co.* v. *United States*, W. D. Ky. (three-judge), 225 Fed. 571, 580, affd. 245 U. S. 463, 62 L. Ed. 400; and see note 12(c), *supra*. For administrative action permissible only under limited circumstances after satisfying statutory conditions, it is plain that this is the type of situation which Congress had in mind in requiring that "all decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; * * *", Section 8, Administrative Procedure Act, 5 USCA 1007.

This is particularly so where, as here, by strong emphatic language condemning the rates for specific reasons (note 4, *supra*) and generally as violative of the criteria of *Transcontinental Cases of 1922*, note 16, *supra*, relief is first

denied but, without any other or further showing, is then granted. Courts and administrative agencies have, and must have, power to change their minds. But if it is the rule of law which controls, there must be some basis to indicate that it is reason and judgment that has brought about the change.

All of this is aggravated by the fact that this serious question of whether competing water and motor carriers are to be exposed to what they describe as "suicidal" rates for the indefinite period of investigation, has been treated too much as a matter of pure paper form. When the verified complaint and supporting memorandum brief filed here pointed out that these protestants were entitled, 49 USCA 17(8), note 9, *supra,* to a stay of the order of December 9, 1955 (stated to have been issued by the Fourth Section Board, note 8, *supra*), until decision by Division 2, the Commission on March 2, 1956, "corrected" that to make it appear that this was by Division 2 acting as an appellate division. But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of December 16 stating, contrary to available record facts (note 6, *supra*) that Division 2 was "acting as an appellate division, upon consideration of a petition by respondents [Railroads] requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 * * * be reversed * * *."

The action of Division 2 was not appellate. It was initial. Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record does not change it. On

the contrary, it dramatizes again the danger, under our system, of circumventing judicial review by claiming to find and then belatedly record that which was known in fact but imperfectly reflected in the official papers.

The orders appealed from are, therefore, invalid and for the reasons set forth are set aside and the matter remanded to the Commission for further and not inconsistent proceedings.

REVERSED AND REMANDED TO THE COMMISSION.

.....

United States Circuit Judge.

.....

United States District Judge.

.....

United States District Judge.

APPENDIX C.

IN THE DISTRICT COURT OF THE UNITED STATES
For the Southern District of Texas,
Houston Division.

DIXIE CARRIERS, INC., ET AL.,
Plaintiffs,
vs.
UNITED STATES OF AMERICA,
Defendant.
} Civil Action No. 9544.

JUDGMENT.

BE IT REMEMBERED, that on May 18, 1956, in the above-entitled and numbered case wherein Dixie Carrier, Inc., Gulf Canal Lines, Inc., Mississippi Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureaus are Complainants; Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros. —J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Lines, Inc. are Intervening Complainants; the United States of America is Defendant; the Interstate Commerce Commission is Intervening Defendant, and the carriers by railroad listed in Appendix A of this Judgment are likewise Intervening Defendants, the trial upon its merits came on regularly to

be heard before a Court of three judges convened pursuant to law. All parties appeared by Counsel and the merits of the case were fully presented and the matter was submitted to the Court.

Thereafter, and on August 1, 1956, the Court delivered and filed its unanimous opinion to the effect that the assailed orders are invalid and that the Complainants are entitled to injunctive relief as specified in the said opinion, to which opinion reference is here made.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED, by the Court that (1) the order of the Interstate Commerce Commission entered on December 7, 1955, in its Investigation and Suspension Docket No. 6491, and as subsequently amended by corrective order bearing the same date, and (2) the order of the Interstate Commerce Commission entered on December 9, 1955, responsive to Fourth Section Application No. 31120, identified as Twenty-Sixth Supplemental Fourth Section Order No. 17160, and as amended by corrective order bearing the same date, be, and the same are hereby, declared to be invalid, and said orders are hereby set aside and their enforcement is hereby restrained and enjoined.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the matter out of which the enjoined orders arose, be, and the same is hereby, remanded to the Interstate Commerce Commission for further and not inconsistent proceedings.

RENDERED AND DONE this 17 day of August, 1956.

FOR THE COURT:

/s/ JOHN R. BROWN,
United States Circuit Judge.

for: ALLEN B. HANNAY,
United States District Judge.

for: JOE INGRAHAM,
United States District Judge.

APPROVED FOR ENTRY:

DONALD MACLEAY,
Attorney for Complainants.

JOHN C. RIDLEY,
Attorney for Intervening Complainants.

JOHN H. EARLE,
Attorney for United States of America.

H. NEIL GARSON,
Attorney for Interstate Commerce Commission.

PALMER HUTCHESON, JR.,
Attorney for Intervening Defendant Railroads.

Appendix A.

The intervening railroads are as follows:

The Atchison, Topeka and Santa Fe Railway Company
Gulf, Colorado and Santa Fe Railway Company
Panhandle and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
Chicago, Rock Island and Pacific Railroad Company
Erie Railroad Company
The Kansas City Southern Railway Company
Missouri Pacific Railroad Company
New York Central Railroad Company
The Pittsburgh and Lake Erie Railroad Company
The New York, Chicago and St. Louis Railroad Company
The Pennsylvania Railroad Company
Southern Pacific Company
Texas and New Orleans Railroad Company
The Texas and Pacific Railway Company
Wabash Railroad Company

Filed 20 day of August, 1956.

V. Bailey Thomas,
Clerk,
By L. W. Wiech,
Deputy.

APPENDIX D.

(Statutes Involved.)

Interstate Commerce Act, Sec. 4(1) (49 U. S. C. Section 4(1)):

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: PROVIDED, That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence: AND PROVIDED FURTHER, That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and

in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

Interstate Commerce Act, Sec. 15(7) (*49 U. S. C. Section 15(7)*):

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in

whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Administrative Procedure Act, Sec. 8(b) (5 U. S. C. Sec. 1007(b)):

In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * * *

SUBMITTALS AND DECISION.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Administrative Procedure Act, Sec. 10(e) (5 U. S. C. Sec. 1009(e)):

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

• • • • •

Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

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Nos. 847, 854, 855

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL, *Appellants*

v.

DIXIE CARRIERS, INC., ET AL.

UNITED STATES OF AMERICA, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

On Appeal From the United States District Court for the Southern District of Texas

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 647, 654, 655

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL, *Appellants*

v.

DIXIE CARRIERS, INC., ET AL.

UNITED STATES OF AMERICA, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

On Appeal From the United States District Court for the Southern District of Texas

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Dixie Carriers, Inc., Gulf-Canal Lines, Inc., Mississippi

Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureau, complainants in the District Court, and Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.—J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Line, Inc., intervening complainants in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment rendered on August 17, and entered on August 20, 1956, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1253, 1336, 2284 and 2325, which declared invalid, and set aside and enjoined certain orders of the Interstate Commerce Commission entered by the Commission in proceedings identified as Investigation and Suspension Docket No. 6491, and Fourth Section Application No. 31120. Timely notices of appeal were filed by appellants, and two Jurisdictional Statements have been filed, one by the appellant railroads, in No. 647, on December 21, 1956, and one jointly by the United States and the Interstate Commerce Commission in Nos. 654 and 655, on December 27, 1956, pursuant to an order of the District Court entered on December 10, 1956, which extended until that date the time for docketing with the Clerk of this Court. By letter dated December 21, 1956, the Clerk of this Court advised counsel for appellees that it would be satisfactory to file a consolidated motion, directed to all three proceedings, within thirty days after the filing of the last two.

STATUTES INVOLVED

In addition to the statutes enumerated by appellants and reproduced in appendices to their Jurisdictional Statements, appellees respectfully refer the Court to the National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001] and Section 14(1), 14(2), 17(6), 17(8) of the Interstate Commerce Act [49 U.S.C. 14(1), 14(2), 17(6) and 17(8)], reproduced in Appendix A, hereto attached.

STATEMENT OF THE CASE

The issues as set forth in the Jurisdictional Statements fall into two distinct groups—those dealing with the action of the District Court with respect to the Commission's order in its Investigation and Suspension proceeding, and those dealing with its action with respect to the Commission's order in its Fourth Section proceeding, and will be considered separately herein.

While the two proceedings had to do with the same rates, they were separate and distinct, arose under different sections of the statute, involved different issues, and were handled under different procedures. The Suspension case arose primarily under section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7), see pages 25-26 of Appendix J to Jurisdictional Statement in Nos. 654, 655]. The Fourth Section case arose primarily under section 4(1) of that Act [49 U.S.C. 4(1), see page 23 of that Appendix].

Neither Jurisdictional Statement raises any question with reference to the applicability of section 17(8) of the Interstate Commerce Act to the Commission's order granting authority to depart from the prohibi-

tion of section 4(1), or whether appellees were and are entitled to have that order stayed pending proper action by the Commission on petitions for reconsideration thereof. Appellees submit, as explained in more detail hereinafter, that such point is completely dispositive of this proceeding, without regard to the merits or demerits of the contentions of the appellants on the questions which they have raised.

THE ORDERS IN QUESTION

Appellants in Nos. 654, 655, have reproduced as Appendices to their Jurisdictional Statement, certain orders and corrected orders of the Commission, and a minute of action by the Fourth Section Board. A full understanding of the procedural progress of these matters in the Commission requires also that the actual dates of the various actions be noted. As Appendix B, hereto there is presented a chronology of the various orders of the Commission, showing the development of this litigation, and the present posture of the proceedings before the Commission. Those "orders" as reproduced by the appellants, some of which will be discussed more in detail hereinafter, require some elaboration at this point for complete clarity.

Their Appendix A—is titled "Second Corrected Order" in the Suspension case, suspending the rates. This was served on November 8, 1955, and was intended, as was the First Corrected Order in that proceeding, to modify the designation of one of the schedules being suspended. Comparison of the corrected order with the original (Item 1 of Note of Evidence No. 2 presented to the District Court) indicates a typographical error in the omission of several words

from the second paragraph of the recitations. In the original that paragraph read as follows (bracketed words are those omitted in corrected order):

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of [the National Transporation Policy and be in contravention of] the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:".

Their Appendix D—Is a minute of the Commission's Fourth Section Board, which never was framed as an order, and was not served upon the parties nor released to the public.

Their Appendix E—Order vacating the suspension effective December 17, 1955, dated December 7, 1955, was served on December 13, 1955.

Their Appendix F—"Corrected" order vacating the suspension, dated December 7, 1955 was not served until March 2, 1956, after these appellees had filed their complaint in the District Court. This restates in the negative the reasons set forth in the "corrected" suspension order, even to following the apparent typographical error.[1]

---

[1] Railroad appellants in No. 647 raised a question, (numbered 8) in their Notice of Appeal filed with the District Court, whether the Interstate Commerce Commission has the power to correct an order after the validity of the original order has been challenged by court action. That refers, of course, to the "corrected" order

Their Appendix G—"Corrected" Fourth Section Order granting relief from the prohibition of Section 4(1) of the Interstate Commerce Act, responsive to Fourth Section Application No. 31120, effective December 17, 1955. The original order was entered December 9, 1955, appellees and other interested protestants were informally advised of its issuance on December 12, 1955, and the order was served December 29, 1955. That original order bore the notation, "By the Commission, Fourth Section Board", although headed as is the "corrected" order. The "correction" made by the corrected order, served March 2, 1956 (after suit had been filed) was to substitute "By the Commission, Division 2, acting as an Appellate Division."

Their Appendix H—Order denying petitions of appellees and others for reconsideration of the order

---

of December 7, 1955, in I. & S. Docket No. 6491 (Appendix F to Jurisdictional Statement in Nos. 654, 655), served March 2, 1956, in which the Commission replaced the "and good cause appearing therefor" which bottomed the original, with a restatement in the negative of the reasons which it had given, pursuant to statutory requirement, for the suspension—even to negating the statement that the r es would be in contravention of section 4(1)—an obvious absurdity in view of the pending Fourth Section Application. The appellants in Nos. 654, 655 do not raise that question, and the railroad appellants do not appear to press it in their Jurisdictional Statement. We assume that it may be considered dropped [Rule 15(c)(1)]. In any event, the District Court was obviously correct in holding that this "was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions." As that Court noted, "It was an attempt to substitute reasons where none had appeared or been recorded." The District Court further cited with approval, *Long Island Railroad Company* v. *United States*, 140 F. Supp. 823, 828, that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate.

(Appendix E) vacating the Suspension order, dated and served December 16, 1955.

Their Appendix I—Order of the Commission, by Division 2, acting as an appellate division, denying petitions of appellees and others for reconsideration of the order granting fourth section relief. Although dated December 16, 1955, this order was not served until April 27, 1956, after Answers of the United States, the Commission, and the intervening railroads had been filed in the District Court proceeding, and the minute of Division 2 action purportedly on December 16, 1955, upon which it is stated to have been based was not entered until April 30, 1956.

ISSUES RELATING TO THE COMMISSION'S INVESTIGATION AND SUSPENSION PROCEEDING

The first three questions, as stated by both groups of appellants, are practically identical, and relate solely to the action of the District Court in invalidating the order of the Commission by which it vacated that part of a previous order which had suspended the operation of certain rail rate tariffs. As stated by appellants in Nos. 654, 655, those questions are:

1. "Whether the Commission's order vacating the suspension is subject to judicial review."

2. "Whether Section 8 of the Administrative Procedure Act required the Commission to make findings in support of its order vacating the suspension."

3. "Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect and prior to a final decision on their lawfulness by the Commission."

Practically identical questions, arising from facts and circumstances also practically identical to those here (so far as concerns the "Suspension" aspect of this case), are presently before the Court in No. 244, this Term, *United States of America and Interstate Commerce Commission* v. *Amarillo-Borger Express, Inc., et al* (138 F. Supp. 411; probable jurisdiction noted, 352 U.S. 817, 1 L. ed. 2d 44 and appellants' briefs were filed January 22, 1957), where they are stated in almost the same words.

It should be noted that both in the Suspension aspect of this proceeding and in No. 244 [Amarillo-Borger] the cases have long since become moot by reason of the operation of the seven months time limit set by section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)] upon the Commission's power to suspend. The rates at issue in the latter proceeding went into effect by operation of the statute many months ago, without regard to the validity of the Commission's order vacating the suspension. The same is true here with respect to the Suspension case. Consequently, except as a matter of principle, the appellees in all of these proceedings have no further interest and nothing material to gain through affirmance nor to lose through reversal—which probably explains the absence of any resistance to the appeal in No. 224.

So far as that principle is concerned, the matter now is before the Court in that proceeding, and we may assume that it will be settled there. Evidently the United States and the Interstate Commerce Commission take the same view, as at page 7 of their Jurisdictional Statement in Nos. 654, 655, they merely refer to the status of No. 244 and refrain from further dis-

cussion of those questions. Despite the present posture of the identical questions in that case, however, we feel that we should point out to the Court the more evident fallacies in the reasoning set forth in the contentions of the railroad appellants in No. 647.

They would treat the decision of the District Court as an invasion of the Commission's discretionary and exclusive power to suspend a rate. They cite numerous decisions which support that power, and refer to the large number of suspension matters handled by the Commission during the course of a year. The fact is that the decision of the District Court in no way impinges upon the power to suspend, nor does it require that suspension proceedings of the Commission be cloaked with any greater degree of formality than at present. All that it does is to require that once a rate has been suspended by an order which sets forth, as required by section 15(7), a statement of the reasons for such suspension, a subsequent order vacating that suspension must similarly contain a statement of the reasons upon which it is predicated. Certainly nothing could be more in accord with ordinary principles of orderly procedure.

This Court has held that the provisions of the Administrative Procedure Act [5 U.S.C. 1001, et seq.] are applicable to Interstate Commerce Commission proceedings. *Riss & Co., Inc.* v. *United States, et al,* 341 U.S. 907, 95 L. ed. 1345—*Per Curiam,* citing *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 94 L. ed. 616. See also *Coyle Lines, et al* v. *United States, et al,* 115 F. Supp. 272 (275); *Chicago & E. I. R. Co.* v. *United States, et al,* 107 F. Supp. 118, 124.

The appellants appear to concede, as they must, that the provisions of that Act are applicable gen-

erally to proceedings under section 15(7) of the Interstate Commerce Act, but contend that after a schedule has been suspended and an investigation has been instituted upon the required statement of the reasons therefor, and the matter has been assigned for the hearing required by statute, the Commission is free to act on the rates and put them into effect without regard to the provisions of the Administrative Procedure Act [5 U.S.C. 1007(b)] requiring that "All decisions (including initial, recommended, or tentative decisions) shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *". In other words, that the Commission may void a vital portion of its previous order without even a statement of the reasons therefor, much less a conclusion of the investigation which it has instituted.

Appellants contend that an order vacating a suspension order and permitting to become effective rates on which the Commission has previously found there exists grave doubt of legality, is not a "final" order, and that the courts are powerless to protect competitors who are immediately, adversely and financially affected thereby.

Administrative action is *final* "when at no future time will its impact on the petitioner become more conclusive, definite, or substantial." [See footnote No. 4 to concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 155; 95 L.ed. 817, 844 (1951).] Certainly where, as here, the order of the Commission permitted to become effective a great number of drastically reduced rail rates, admittedly aimed at their competi-

tors, which had been previously suspended for valid and forceful reasons, and timely petitions by these competitors for reconsideration had been denied, the order had reached *finality*. The fact that Commission was to conduct an investigation of the rates, which might at some future date result in their elimination or modification, in no way lessened their immediate and irreparably adverse impact upon appellees. At no future time in that or any other proceeding before the Commission could the appellees have tested the sufficiency of the Commission's order vacating its previous order of suspension. They had completely exhausted their "administrative remedy", and there was no avenue by which they could proceed in protection against irreparable injury flowing from what they considered an insufficient and therefore illegal order of the Commission other than through the judicial review provided by statute.

Even if it be considered that the scheduled investigation of the rates there in question cast some doubt upon the procedural finality of the order which vacated their previous suspension, it was none the less final so far as its effect upon appellees was concerned. As Mr. Justice Frankfurter states in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* 156, " 'Finality' is not, however, a principle inflexibly applied. If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage." [Citing *Terrace* v. *Thompson,* 263 U.S. 197, 68 L.ed. 255, 44 S. Ct. 15; *Santa Fe Pac. R. Co.* v. *Lane,* 244 U.S. 492, 61 L.ed.

1275, 37 S. Ct. 714; and referring to *Waite* v. *Macy*, 246 U.S. 606, 62 L.ed. 892, 38 S. Ct. 395.]

Thus, in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953), and in *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 134 F. Supp. 210 (1955), three-judge District Courts enjoined the enforcement of Commission orders even where pending petitions before the Commission seeking reconsideration thereof had not yet been passed upon, and the orders admittedly were not *procedurally final*.

ISSUES RELATING TO THE COMMISSION'S FOURTH SECTION CASE

It is at this point that the questions presented in this proceeding depart from those already before the Court in *Amarillo-Borger* (No. 224). The rates which were here proposed by the rail carriers ran counter to the provisions of section 4(1) of the Interstate Commerce Act [49 U.S.C. 4(1)] in that they would have provided for lower charges to more distant points than to intermediate points. That is a competitive weapon of devastating power which the Congress has prohibited; giving the Commission the power to grant relief from the otherwise rigid prohibition only in "special cases, after investigation."

It was necessary, therefore, that there be a valid grant of such extraordinary authority before the rates in question could be lawful. Application for such authority was made by the railroads, and protests were filed on behalf of appellees, among others. The order granting such authority was held invalid by the District Court, as a result of which the rates are no longer in effect. Thus, this aspect of the proceeding is far from moot and the appellees have a very real and com-

pelling interest in the matter, as otherwise the rates at issue would have been in effect throughout the period of complex and prolonged litigation before the Commission (see Appendix B).

Appellees submit that the District Court's action on that order of the Commission clearly is correct and that there is no occasion for further review by this Court.

The first question presented by the appellants on this aspect of the proceeding, [No. 4 in each Jurisdictional Statement], is whether the Commission is required to hold a hearing before granting temporary relief from the long-and-short-haul provision of Section 4(1) of the Interstate Commerce Act. We respectfully submit that no such question is presented. As to it, the District Court specifically stated, "But this is a point we need not decide." The "holding" attributed to it by appellants in Nos. 654, 655, at page 7 of their Jurisdictional Statement, that "the statute thus clearly implied that the question [whether such relief should be granted] shall be determined upon testimony and after a hearing" actually was only a quotation from the decision in *Louisville & N.R. Co.* v. *United States,* 225 Fed. 571, affd. 245 U.S. 463, 62 L. ed. 400. That is recognized by appellants in No. 647, who further point out that the question here discussed was not decided in that case. Yet appellants would now have this Court rule upon what they state is dictum from another decision handed down more than forty years ago.

We feel that a good case could be made for the necessity of such a hearing,[2] but we did not urge it

[2] In footnote No. 7 of their Jurisdictional Statement, appellees in Nos. 654, 655 refer to the Commission's rules recognizing need for

even before the District Court. What we did there urge was that the Commission may not grant temporary fourth-section relief prior to an investigation which it has instituted, in which it has determined that a hearing must be held, and to which a Hearing Examiner has been assigned to conduct such hearing and prepare appropriate recommendations. That was the situation here.

We submit that there exists here no substantial question.

The second question presented by the appellants on this aspect of the proceeding [No. 5 in both Jurisdictional statements[3]] is whether the Interstate Commerce Commission is required to make findings to support an order granting temporary relief from the prohibitions of Section 4(1) of the Interstate Commerce Act.

The very words of the statute itself indicate that the answer to that question must be in the affirmative. The statute requires that the Commission find a "special case", and that it must also find the proposed charges to be "reasonably compensatory for the service performed." In the absence of a finding of a "special case" the Commission lacks jurisdiction. In the absence of a finding that the charge will be "reasonably

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expeditious informal proceedings on Section 4 applications. It also should be noted that in Rule XVIII of the Commission's Rules of Practice under the hearing "Applications under the Fourth Section", it is stated in paragraph (f), "It is the uniform practice of the Commission to hold hearings upon the request of any interested party." [Vol. 8 Interstate Commerce Acts, Annotated, p. 6267.]

[3] —and inferentially raised in question No. 7 of the railroads in No. 647—not repeated by the appellants in Nos. 654, 655.

compensatory" it is specifically forbidden to grant the extraordinary authority. A power under which an administrative body may permit an applicant to depart from a prohibition of the statute, must be administered with careful regard for the limitations which the Congress has placed upon that power.

Even if it were held that the provisions of the Administrative Procedure Act [5 U.S.C. 1001, et seq., discussed *supra*, page 9] were not applicable to the "investigation" required by the statute to be conducted by the Commission before it may grant relief from the prohibition of section 4(1), it is clear that the provisions of section 14(1) and (2) of the Interstate Commerce Act [49 U.S.C. 14(1) and (2), Appendix A hereto] are applicable. Those provisions of the statute require that the Commission shall make a report in writing in respect to every investigation made by it, "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises * * *", and that reports of investigations made by the Commission "shall be entered of record, and a copy thereof shall be furnished [to the parties]". Certainly that requires something more than a bald grant of authority to depart from the terms of the statute, unaccompanied by even a shred of reasoning to support such grant, or any indication that the required "investigation" has been made—as in this instance it obviously had not.

As this Court noted in *Alabama Great Southern R. Co., et al* v. *United States, et al.*, 340 U.S. 216, 227, 228, 95 L.ed. 225, 237, while section 14(1) of the Interstate Commerce Act [49 U.S.C. 14(1)] does not require that the Commission make detailed findings of fact except in a case where damages are awarded, it does not re-

lieve the Commission of the duty to make the "basic" or "quaisi-jurisdictional" findings essential to the statutory validity of an order. Citing *Florida* v. *United States,* 282 U.S. 194, 215, 75 L.ed. 291, 304; and *United States* v. *Baltimore & O. R. Co.,* 293 U.S. 454, 464, 465, 79 L. ed. 587, 594, 595.

The third question presented by the appellants on this aspect of the proceeding [No. 6 in both Jurisdictional Statements] is whether an order of the Interstate Commerce Commission under section 4(1) of the Interstate Commerce Act [49 U.S.C. 4(1)] is subject to judicial review, particularly at the suit of competing carriers. In evaluating the merit of the appellants' position on this question, it is important to note that authority to maintain drastically reduced rates to distant competitive points, while at the same time maintaining much higher rates on the same commodities to intermediate points, is a competitive weapon of devastating power, and that competitors whose traffic is the subject of such rate making have a very real and immediate interest in proceedings in which proposals to depart from the terms of the statute are at issue.

In support of their position all of the appellants rely primarily upon the opinion by Justice Brandeis in *United States of America, et al.* v. *Merchants and Manufacturers Traffic Association of Sacramento, et al.,* 242 U.S. 178, 61 L.ed. 233 (1916). The question which the Court there had before it bears no resemblance to the issues here. There communities and shippers who challenged the order of the Commission in the Court were not parties to the lengthy and involved proceedings before the Commission, but petitioned for "rehearing" after the Commission had

issued its decision. Such petition having been denied, they brought suit contending that the orders of the Commission were made without their "having their day in court or without giving them an opportunity to show the unreasonableness thereof * * *" (184). On appeal from a decision which cancelled and set aside certain portions of the orders of the Commission, this Court held, in effect, that the complaining communities were not necessary parties to the Commission proceeding. This is a far cry from the situation of these appellees, who were and are vigorous protestants in the proceedings before the Commission, who were and are directly and vitally concerned with the issues there presented,[4] and who would suffer irreparable injury by reason of the action of the railroads taken pursuant to the Commission's authorization of departure from the requirements of the statute.

The Commission itself has long recognized the direct and vital interest of competitive carriers in proceedings on railroad applications for relief from the prohibition

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[4] The other cases cited by appellants add no strength to their contention. All were controlled by factors not here present. In *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, the Court found that the plaintiffs had not clearly shown that they suffered any injury by nature of the orders (492-3) and that in any event they had an avenue for redress by way of reparation (496). In *Atchison, Topeka and Santa Fe Ry.* v. *United States*, 130 F. Supp. 76, the complaint failed to allege that the plaintiffs had suffered or been threatened with any damage or financial injury (78). In *Pittsburgh and W. Va. Ry. Co.* v. *United States*, 281 U.S. 479, 486, 76 L. Ed. 979, the Court held that appellant was not entitled "to institute an independent suit * * * in the absence of resulting actual or threatened legal injury to it." The comments in *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F. 2d 1010, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. Ed. 543, to which appellants evidently allude, had to do with competition *otherwise lawful*.

of section 4(1). In *Transcontinental Cases of 1922*, 74 I.C.C. 48, the Commission gave careful consideration to section 4(1) as amended by the Transportation Act of 1920; particularly noted that it was then required to accord due observance to section 500 of that Act (49 U.S.C. 142) which declared the policy of Congress to be "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation"; and concluded (71) that in the administration of section 4(1) as amended, after a "special case" had been found the proposed rates were to be judged by four criteria, two of which directly relate to the interests of competing water carriers: that they "be no lower than necessary to meet existing competition", and that they be "not so low as to threaten the extinction of legitimate competition by water carriers".

If anything, the National Transportation Policy enacted as a part of the Transportation Act of 1940 (Appendix A hereto) in clearer and much more forceful language requires recognition of the interests of competitive carriers in such matters, declaring it to be the policy of Congress to "provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * * without * * * unfair or destructive competitive practices * * *"; and specifically requiring that all of the provisions of the Interstate Commerce Act be administered and enforced with a view to carrying out that declaration of policy.

The universal recognition of the interest and standing of competitive carriers in proceedings under Sec-

tion 4(1) is emphasized by the fact that the application of the rail carriers in FSA 31120 (Item No. 1 of Note of Evidence No. 1 filed in the District Court) carries a Certificate of Service showing that it was served upon various of these appellees.

We submit that the contention of the appellants that appellees had no standing to maintain this proceeding in the District Court is completely without merit.

THE DISPOSITIVE POINT IGNORED BY THE APPELLANTS

None of the appellants raises any question with respect to that phase of the decision of the District Court which is fully and finally dispositive of the primary issue here raised in this proceeding—whether the order granting relief from the prohibition of section 4(1) was valid. By not raising any question regarding it, either in their respective Notices of Appeal or in their Jurisdictional Statements, appellants apparently have accepted as correct the conclusion of the District Court that the action of Division 2 in granting such relief [see Appendix G, Jurisdictional Statement in Nos. 654, 655, and our discussion thereof, *supra*, page 6] was not an appellate, but an *initial* action.[5] Therefore

[5] The District Court stated the facts in its footnote No. 6, 143 F. Supp. 849 [page 26, Appendix B, Jurisdictional Statement, No. 647], as follows: "No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, 'Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491', it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to in-

under the clear provisions of section 17(8) of the Interstate Commerce Act [49 U.S.C. 17(8); quoted in Appendix A hereto], timely petitions for reconsideration thereof having been filed by appellees and others, they were entitled to a stay, as a matter of specific statutory commandment, pending disposition of the matter by the Commission.

The entering by Division 2, months later, of a predated order, predicated upon a predated minute, and containing recitations not in accord with the available facts,[6] cannot operate to deprive parties of their statu-

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terested parties affected by it, 49 USCA 14(1)(2), 17(5); 5 USCA 1002, which was not done.

"The Railroads' Petition FSA 31120 itself reflects this: 'As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • • '. (Emphasis supplied)

"The Prayer stated: 'Wherefore these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120': and compare this with the document filed simultaneously in I & S 6491, denominated a 'Petition • • • for Reconsideration' and opens, 'Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for reconsideration of the Order of the Suspension Board • • • '". (Emphasis supplied)

[6] The District Court stated [143 F. Supp. 844, 854; page 36, Appendix B, Jurisdictional Statement in No. 647]: "But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of Division 16 stating, contrary to available record facts (note 6 supra) that Division 2 was 'acting as an appellate division, upon consideration of a petition by respondents (Railroads) requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 • • • be reversed • • • '

"The action of Division 2 was not appellate. It was initial.

tory right to have their petitions for reconsideration of an initial action by a Division considered and passed upon by the Commission, nor of their statutory right to a stay of the order pending such disposition.

That circumstance, standing alone, was and is enough to require that the order purporting to grant an exception from the prohibition of section 4(1) be declared invalid, be set aside, and its enforcement be restrained and enjoined. The findings and conclusions of the District Court on this aspect of the case stand unchallenged by the appellants (Rule 15(c)(1) of the Revised Rules of the Supreme Court).

Without valid relief from the prohibition of section 4(1) the rates contained in the schedules in question were unlawful, and could not be maintained. Therefore, without regard to the merits or demerits of the contentions of the appellants on the various other questions raised, and we submit that none have merit, the end result must be the same so far as this proceeding is concerned, and the Judgment of the District Court must be affirmed.

Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record and does not change it."

CONCLUSION

WHEREFORE, the appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the opinion and decree of the District Court should be affirmed.

Respectfully submitted,

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January 25, 1957

Proof of Service

I, Donald Macleay, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of January, 1957, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

(1) On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid, to J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.; and Victor R. Hansen, Assistant Attorney General, Department of Justice, Washington 25 D. C.

(2) On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and to H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(3) On the Atchison, Topeka & Santa Fe Railway Company et al., railroad appellants, by mailing copies in duly addressed envelopes with air mail postage prepaid to their attorneys of record, Robert H. Bierma, 652 Union Station, Chicago 6, Illinois; Richard J. Murphy, 1225 La Salle Street Station, 139 West Van Buren Street, Chicago 5, Illinois; and Harvey Huston, 1211 Railway Exchange, 80 East Jackson Boulevard, Chicago 4, Illinois.

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APPENDIX A

(Statutes involved in addition to those cited by appellants.)

NATIONAL TRANSPORTATION POLICY, 49 U.S.C., preceding 1, 301, 901 and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

INTERSTATE COMMERCE ACT, Sec. 14(1) (49 U.S.C. Section 14(1)):

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in

case damages are awarded such report shall include the findings of fact on which the award is made.

INTERSTATE COMMERCE ACT, Section 14(2) (49 U.S.C. Section 14(2)):

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

INTERSTATE COMMERCE ACT, Section 17(6) (49 U.S.C. Section 17(6)):

After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply

for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

INTERSTATE COMMERCE ACT, Section 17(8) (49 U.S.C. Section 17(8)):

Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

APPENDIX B

Chronology

(Including actions and developments since the record was made in the District Court.)

September 19, 1955—Fourth Section Application No. 31120 filed. Railroad rate schedules filed, effective October 26, 1955.

(Various Protests and Petitions for Suspension, and Relies thereto, seasonably filed.)

October 21, 1955—Order of Board of Suspension, dated October 20, 1955, suspending the rate schedules in I. and S. Docket No. 6491, served.

(Corrected Orders, modifying specification of suspended schedules, served November 1 and 8, 1955.)

(Petition for Reconsideration of order of Board of Suspension of October 20, 1955, in I. & S. Docket No. 6491, and "Petition for Issuance of Fourth Section Relief", and replies thereto, seasonably filed.)

November 25, 1955—Both proceedings assigned for hearing at Houston, Texas, on January 24, 1956, before a Hearing Examiner.

December 7, 1955—Order of Division 2, vacating suspension, dated December 7, 1955, effective December 17, 1955, served December 13, 1955.

December 9, 1955—Order granting fourth section relief, effective December 17, 1955. Protestants were informally advised thereof on December 12; the order actually was served on December 29, 1955.

December 14-16, 1955—Petitions for reconsideration of order dated December 7, vacating suspensions of schedules, and Petitions for reconsideration of order dated December 9, granting fourth section relief, filed.

December 16, 1955—Notice dated December 15, to the effect that the petitions in I. & S. Docket No. 6491 seeking reconsideration and stay of the order vacating the suspension of schedules would not be entertained by Entire Commission, served.

December 16, 1955—Notice dated December 16 to the effect that the petitions in I. & S. Docket No. 6491 seeking reconsideration and stay of the order vacating the suspension of schedules were denied, served.

December 16, 1955—Order of Division 2, in I. & S. Docket No. 6491, dated December 16, 1955, denying petitions for reconsideration and stay, served.

December 17, 1955—Schedules became effective.

January 24, 1956—Hearing in both proceedings commenced at Houston, Texas. It adjourned on January 27, to reconvene at Washington, D. C. on March 5, 1956.

(Complaint and Intervening Complaint filed with District Court—CA 9544—and plaintiffs' Memorandum Brief filed.)

March 2, 1956—"Corrected Order" dated December 7, 1955, vacating suspension in I. & S. 6491, served.

March 2, 1956—"Corrected Order" dated December 9, 1955, granting fourth section relief, served.

March 5, 1956—Hearing in both proceedings resumed at Washington, D. C. Concluded on March 9, 1956.

(Answer of United States and interventions and answers of Interstate Commerce Commission and railroads, filed with District Court.)

April 27, 1956—Order of Division 2, dated December 16, 1955, referring to both I. & S. Docket No. 6491 and F.S.A. 31120, and denying petitions for reconsideration and stay of order of December 9, 1955, in the latter, granting fourth section relief, served.

(Briefs filed and case heard by District Court in C.A. 9544.)

May 24, 1956—Briefs filed with Interstate Commerce Commission in both proceedings.

(Opinion of District Court in C.A. 9544, on August 1, 1955—finding both the order vacating the suspension in I. & S. No. 6491 and the order granting fourth section relief pursuant to F.S.A. 31120 invalid.)

August 6, 1956—By petition of that date, railroad applicants in F.S.A. 31120 requested the Entire Commission to grant "temporary fourth section relief pending final determination by the Commission of the issues embraced herein and in related proceedings." Replies thereto were seasonably filed. There has been no action by the Commission on that petition.

(Judgment entered by the District Court in C.A. 9544, on August 17, 1955—declaring both orders invalid, setting them aside, and restraining and enjoining their enforcement.)

August 27, 1956—The railroads filed a supplement, effective August 29, 1956, under special permission of the Commission, placing the schedules back under suspension, and reestablishing the basis of rates as it had existed prior to December 17, 1955.

October 31, 1956—Proposed report of the Hearing Examiner served. It recommends that the rates at issue be found not shown to be just and reasonable, that the schedules be ordered cancelled, and that fourth section relief be denied.

December 26, 1956—Exceptions of railroads and others to the Examiner's proposed report filed. (Due date extended from November 30, 1956, at request of railroads.

January 15, 1956—Replies to exceptions filed on behalf of appellees and others.

Office Supreme Court, U.S.
FILED
NOV 4 1957
JOHN T. FEY, Clerk

Nos. 60, 61 and 62

In the Supreme Court of the United States

OCTOBER TERM, 1957

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

DIXIE CARRIERS, INC., ET AL.

UNITED STATES OF AMERICA, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.
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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 60

ATCHISON, TOPEKA & SANTA FE RAILWAY CO., ET AL., APPELLANTS

v.

DIXIE CARRIERS, INC., ET AL.

No. 61

UNITED STATES OF AMERICA, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

No. 62

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MEMORANDUM SUGGESTING THAT THE CAUSE IS MOOT

These cases involve basically the question of whether an order of the Interstate Commerce Commission

vacating a prior order suspending newly filed rates under Section 15 (7) of the Interstate Commerce Act, as well as a Commission order granting temporary relief under Section 4 (1) from the long-and-short-haul provision of that section, are subject to judicial review.

Acting under Section 15 (7) of the Act, the Commission ordered the suspension of certain proposed railroad rate schedules pending a hearing and determination on the lawfulness of such schedules. At the same time, the Commission withheld relief from the long-and-short-haul provision of Section 4 (1) of the Act and assigned the matter for hearing along with the question of the lawfulness of the rates under Section 15 (7). Subsequently, the Commission vacated the suspension orders but continued the investigation into the lawfulness of the rates and, pending the hearing, granted temporary relief from the long-and-short-haul provision.

In this action brought by certain competing carriers who had filed protests against the proposed rate schedules, which had gone into effect in the interim, the District Court set aside the Commission orders. On March 25, 1957, this Court noted probable jurisdiction. 353 U. S. 906.

During the pendency of the judicial proceedings, the Commission continued its investigation of the rate schedules in question. On July 11, 1957, the Commission announced its decision in the case, holding that certain of the rate schedules had not been shown to be just and reasonable. The Commission accordingly ordered the schedules cancelled and the Fourth Section application denied, without prejudice to the establishment of rates not inconsistent with the findings made (Appendix, *infra*, pp. 5–44). On October 16, 1957, the Commission denied the railroads' petition for reconsideration (Appendix, *infra*, pp. 44–45).

In view of these developments, it is believed that the cause is now moot. Cf. *Arkansas & Louisiana Missouri Railway Co.* v. *Amarillo-Borger Express, Inc.*, 352 U. S. 1028 (involving similar issues). The Commission's order of July 11, as modified by its order of October 16, requires cancellation as of November 20, 1957, of the rate schedules involved in the orders enjoined by the District Court, and thus the propriety of the Commission's earlier actions vacating its suspension order and granting temporary Fourth Section relief is now only of academic interest. All the parties therefore join in requesting that the judgment below be vacated and the case remanded to the District Court with directions to dismiss the complaint. See *Sawyer* v. *Dollar*, 344 U. S. 806; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39;

Arkansas & Louisiana Missouri Railway Co. v. *Amarillo-Borger Express, Inc.*, *supra*.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT W. GINNANE,
General Counsel,
Interstate Commerce Commission.

HARVEY HUSTON,
Counsel for Appellants in No. 60.

DONALD MACLEAY,
Counsel for Appellees.

NOVEMBER 1957.

APPENDIX.

INTERSTATE COMMERCE COMMISSION

No. 31860[1]

STEEL PIPE—EAST TO SOUTHWEST

Decided July 11, 1957

All-rail rates on iron or steel pipe, in carloads, from points in western trunkline, official, and southern territories to points in the Southwest, found not shown to be just and reasonable. Schedules ordered canceled and fourth-section applications denied, without prejudice to the establishment of rates not inconsistent with the findings made.

Edwin N. Bell, Robert H. Bierma, Robert G. Boes, Ralph M. Buzek, J. T. Clark, James W. Hoeland, Harvey Huston, Richard J. Murphy, Walter G. Treanor, E. R. Gustafson, V. H. Livingston, R. B. Kelly, O. P. Wieland, J. A. Gorman, J. P. Canny, E. J. Heater, John P. Ganly, B. V. Reynolds, J. Grady May, and *Thurmond A. Miller* for respondents.

[1] This report embraces also Investigation and Suspension Docket No. 6491, Pipe, Official and Southern Territories to Southwest; Fourth-Section Application No. 30890, Steel and Wrought Iron Pipe to Kansas, Oklahoma, and Southwest Missouri; and Fourth-Section Application No. 31120, Steel and Wrought Iron Pipe to the Southwest.

John F. Donelan, Dickson R. Loos, Paul V. Miller, T. F. Lynch, Robert R. Wertz, Edward M. Boyne, J. Taylor, J. R. Lewallen, Robert J. Steele, R. R. Clark, W. G. Felton, J. F. Davis, John N. Lind, R. A. Eldridge, and *J. L. Guthrie,* for parties supporting respondents.

Harry C. Ames, Nuel D. Belnap, Richard J. Hardy, Harry W. Patterson, Donald Macleay, W. Y. Wildman, T. S. Christopher, L. L. Leonard, Erwin H. Strobel, Wesley A. Rogers, R. A. Ellison, Russell S. Bernhard, W. S. Jermain, J. Haden Alldredge, John C. Ridley, Thad Grundy, M. P. Hamby, Ralph W. Currie, B. M. Busby, Frank Kesler, R. K. Keas, Kenneth P. Tubbs, Robert B. Reedy, G. B. Perry, James P. Kenny, Rex W. Hall, Lon L. Nusom, and *James H. Eubanks* for protestants.

REPORT OF THE COMMISSION

Division 2. Commissioners Freas, Winchell, and McPherson

By Division 2:

Exceptions to the report proposed by the examiner were filed by the respondents and certain supporting parties, and by protestants representing Amarillo and Lubbock, Tex., interests. Replies to the exceptions were filed by the protestants barge lines and motor carriers, a protestant representing the port of Brownsville, Tex., protestants representing steel companies at East St. Louis, Ill., and Lone Star, Tex., and by the respondents. Exceptions and requested findings not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified. The issues were argued orally before us.

The title proceeding concerns certain rail schedules which became effective on August 31, 1955, wherein the respondents[2] established reduced rail rates[3] on iron or steel pipe or tubing, in carloads, from points in western trunkline and official territories to points in the Southwest, principally Kansas, Oklahoma, and southwestern Missouri. In connection with these schedules, the respondents filed fourth-section application No. 30890 seeking relief from the long-and-short-haul provision of section 4 of the Interstate Commerce Act. Various water carriers, motor carriers, and others requested suspension of the proposed schedules and denial of the fourth-section application. Suspension was declined, but division 2, by order dated August 30, 1955, instituted this investigation into and concerning the lawfulness of those rates. The Commission's Fourth Section Board granted temporary fourth-section relief, pending hearing, by 22nd supplemental fourth section order No. 17160.

A petition was filed on behalf of several protestant barge lines requesting that we vacate the Board's order granting temporary fourth-section relief on the ground, among others, that the rates which the respondents were thereby permitted to establish are so low that they have in fact destroyed water-carrier competition in the transportation of pipe on the Missouri River to Kansas City, Mo., for ultimate delivery in Kansas, Oklahoma, and southwestern Missouri. To grant such relief, under these circumstances, they allege, is to ignore the criteria to be observed in

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[2] The term respondents also includes those who are applicants in the fourth-section applications.

[3] Unless otherwise indicated, rates, costs and charges are stated per 100 pounds and do not include the increases authorized in Ex Parte Nos. 196, and 206.

granting fourth-section relief as laid down in *Transcontinental Cases of 1922*, 74 I. C. C. 48, 71, wherein the Commission said, among other things, that the words "reasonably compensatory" as used in the administration of the fourth section of the act imply a rate not so low as to threaten the extinction of legitimate competition by water carriers. Replies to the petition were filed by the respondents and a supporting shipper. The issues raised by the petition are discussed more fully elsewhere in this report. In view of our conclusions herein, no action on this petition is necessary.

Investigation and Suspension Docket No. 6491 concerns certain rail schedules originally filed to become effective on October 26, 1955, wherein the respondents proposed to establish reduced rail rates on iron or steel pipe or tubing, in carloads, from points in western trunkline, official, and southern territories to points in southwestern territory. In connection with these latter schedules, the respondents filed fourth-section application No. 31120 seeking relief from the long-and-short-haul provisions of section 4 of the act. The protestants in the title proceeding, and others, requested suspension of these schedules also, and denial of the fourth-section application. By order of October 20, 1955, the proposed schedules were suspended to and including May 25, 1956, and this investigation was instituted into and concerning the lawfulness of the rates proposed.

On December 7, 1955, division 2, acting as an appellate division, vacated the order of October 20, 1955, as of December 17, 1955, insofar as it suspended the operation of the proposed schedules, but the investigation was continued in full force and effect. Temporary fourth-section relief, pending a hearing, also was granted by division 2 in 26th supplemental

fourth-section order No. 17160, dated December 16, 1955. The rates became effective on December 17, 1955. However, by Civil Action No. 9544, eight barge lines, together with the Waterways Freight Bureau, brought an action in the United States District Court for the Southern District of Texas, Houston Division, to set aside the foregoing orders of division 2 insofar as they vacated the suspension order and granted temporary fourth-section relief. By its decision of July 31, 1956, the court held the orders to be invalid. In purported conformity with the court decree, entered August 20, 1956, the respondents resuspended their proposed schedules and reestablished their former rates effective on August 29, 1956. The judgment of the District Court has been appealed to the Supreme Court of the United States.

At the time of the hearing herein all of the rates under investigation were in effect, and they will be referred to herein as the present rates. The respondents are rail carriers operating from western trunkline, official, and southern territories to the Southwest. Supporting the respondents are large steel companies, certain oil and pipeline companies, and the Beaumont, Tex., Chamber of Commerce. The protestants are the competing barge lines and coastwise ocean carriers, together with the southwestern motor carriers of oilfield equipment and supplies, port interests at Houston, Brownsville, and Corpus Christi, Tex., certain steel companies with plants at Lone Star and at St. Louis, Mo., and other interests at Oklahoma City, Okla., and Amarillo and Lubbock.

Rates to Kansas from western trunkline and official territories.—Prior to July 6, 1933, commodity or combination rates applied. In *Iron or Steel Pipe in Western Trunk-Line Territory,* 192 I. C. C. 745, a

rating on pipe, minimum 40,000 pounds, of 32.5 percent of the first-class rates as prescribed in *Western Trunk-Line Class Rates,* 164 I. C. C. 1, was found justified. Rates on that basis became effective on July 6, 1933. In *Iron and Steel to Iowa, Minn., Mich., and Wis.,* 263 I. C. C. 361, a rating of 28 percent of the same first-class rates was approved for application from official and western trunkline shipping points to destinations in Nebraska, and the same basis was voluntarily established to points in Kansas on and north of a line running through Paola, Ottawa, Emporia, Abilene, and Concordia. Fourth-section relief in connection therewith was granted by fourth-section order No. 15422.

In *Panhandle Eastern Pipe Line Co.* v. *Akron, C. & Y. R. Co.,* 289 I. C. C. 702, and *Coleman Co., Inc.,* v. *Akron, C. & Y. R. Co.,* 291 I. C. C. 260, rates were prescribed from producing points in western trunkline and official territories to Hugoton, Wichita, and Hutchinson, Kans., on the basis of 30 percent of the first-class rates prescribed in docket No. 28300, *Class Rate Investigation,* 1939, 281 I. C. C. 213. Later, the same basis was voluntarily established to various other points, and effective on September 10, 1955, a class-30 exceptions rating was established.

On April 10, 1955, an alternating lower scale of rates subject to a minimum of 70,000 pounds, as hereinafter described, was published to destinations in the Southwest beyond Kansas, and the Arkansas or Oklahoma border point rates were established as maxima at intermediate points in Kansas and Missouri. On August 31, 1955, rates subject to a minimum of 70,000 pounds were established from official and western trunkline producing points to docket No. 28300 base points in Kansas. These rates are embraced in the title proceeding. They purportedly reflect the barge-truck

costs over the port of Kansas City, observing certain minimum rates in order to minimize fourth-section departures and preserve the carriers' revenues to heavy pipe-consuming areas.

In general, the foregoing rates, other than those established on and after April 10, 1955, were subjected to increases authorized in the ex parte proceedings. In most instances percentage increases were established, but in Ex Parte No. 162 the maximum increase observed was 10 cents per 100 pounds, but not to exceed $2 per ton, net or gross as rated; and in Ex Parte No. 166 the maximum increase observed was 16 cents per 100 pounds. The maximum limitations had the effect of lowering the percentage relations to first class.

Rates within and to southwestern territory.—Prior to July 28, 1940, pipe to and within the Southwest moved on commodity rates. Traffic tests made for the year 1935 indicated that the average rates charged from official, western trunkline, and southeastern territories were about 30.3, 31.1, and 24.6 percent, respectively, of the first-class rates prescribed in *Consolidated Southwestern Cases,* 205 I. C. C. 601. In *Wrought Pipe and Fittings,* 234 I. C. C. 347, decided in 1939, the Commission prescribed a maximum reasonable basis of 32.5 percent of the same first-class rates, and suggested rates from the Pittsburgh, Pa., area to the Southwest to meet barge competition which average about 27.5 percent of first class. Thereafter the rail carriers established rates within and to the Southwest generally reflecting the 27.5 percent basis except that the western trunkline-southwestern border-point rates were observed as minima and the Texas common-point rates as maxima. Lower water-compelled rates to the Gulf Coast were retained. On December 10, 1955, rates from official territory to the

Southwest based on 30 percent of the docket No. 28300 first-class rates became effective. Publication of the same basis from western trunkline territory has been delayed because of fourth-section difficulties. The foregoing rates are subject to a minimum of 40,000 pounds.

Effective on April 10, 1955, a lower alternating scale of rates subject to a minimum of 70,000 pounds was established from western trunkline, official, and southern territories to the Southwest. To points on and east of a line running from Kiowa, Kans., to Laredo, Tex., the rates were made 20 percent lower than the then-existing 40,000-pound rates. To points west of that line the new 70,000-pound rates reflected the then-existing 40,000-pound rates exclusive of the Ex Parte No. 175 increase of 15 percent. Thus, the rates to points west of the line were about 87 percent of the 40,000-pound rates and the rates to points east of the line were 80 percent of the 40,000-pound rates.

Thereafter, on August 31, 1955, the 70,000-pound rates from Pittsburgh, Chicago, Ill., and St. Louis were reduced to the barge-truck combinations over Kansas City, Mo., as computed by the respondents, and related reductions were published from other origins. These are the rates under investigation in the title proceeding. On December 17, 1955, additional reductions were established from western trunkline, official, and southern territories to points in Arkansas, Louisiana, Missouri, Oklahoma, and Texas. These purportedly reflect barge-truck combinations from Pittsburgh, Chicago, and St. Louis over Mississippi River and Gulf ports to Docket No. 28300 base points, subject to certain minimum rates. Prior relations from other origins remained undisturbed. From Alabama City and Gadsden, Ala., the rates established were based on costs over rail-truck or rail-barge-

truck routes via Mississippi River and Gulf ports. To points other than docket No. 28300 basing points, the rates made effective on April 10, 1955 were canceled and the class-rate groupings established. These are the rates under investigation in Investigation and Suspension Docket No. 6491. Appendix A hereto shows representative rate changes since 1940 from Pittsburgh to Arkansas City, Kans., Oklahoma City, Dallas, and Houston.

Characteristics and tonnage of the commodity.—Oil country tubular goods consist of wrought iron and steel casing, drill pipe, tubing, and line pipe. Casing is used as a structural retainer for the walls of oil and gas wells to exclude undesirable fluids and to confine and conduct oil or gas from the productive subsurface strata to ground level. Tubing is used within the casing of oil wells to conduct oil to ground level. Drill pipe transmits power by rotary motion to the rotary drilling tool below the surface. Line pipe is used to construct pipe lines from the wells to the refineries and from the refineries to other destinations. Another pipe here involved is standard or merchant pipe which is purchased primarily by wholesale plumbing and heating-equipment distributors and is used for ordinary plumbing and heating purposes.

Wrought iron and steel pipe is readily adaptable to any form of transportation, and it can and usually does move in open-top equipment. Loss and damage claims are negligible. It can easily be stored or stock-piled, which is important in the competitive situations encountered, and permits barge shipments to points on the Missouri River during the open season of navigation for distribution in the winter months when the river is closed to navigation. The density of the pipe promotes heavy loading, usually in excess of 70,000 pounds in rail cars and 500 tons in barges.

Pipe moves in great volume from and to the points here concerned, particularly from official territory to the Southwest. For example, during 1955 volume of pipe moved from the official-territory plants of nine producers to the Southwest aggregated 2,041,467 tons. The pipe traffic of class I railroads from official territory to the Southwest in 1950 constituted about 32.4 percent of their tonnage and produced 26.7 percent of their revenue. In 1954 those percentages were 27.3 and 23.1 percent respectively. The total pipe tonnage of the protestant barge lines, most of which moved from official territory to the Southwest, constituted 3.75 percent of their tonnage and produced 7.3 percent of their revenue in 1950, and 9.67 and 17.38 percent respectively, in 1954.

Purpose of the proposed adjustment.—The alleged purpose of this rate adjustment by the rail lines is to recapture tonnage lost to barge and truck carriers, to prevent a further diversion of tonnage to such carriers, and to meet the competition of new producers at Minnequa, Colo., and Lone Star.

The major production area of pipe is in official territory, and the largest consuming area is in the Southwest. The following table shows the tonnage shipped during recent years over the all-rail routes and the barge or barge-truck routes, and the respective percentages, from the official-territory plants of nine producers to the Southwest:

Year	Total tons shipped	Rail		Barge or barge-truck	
		Tons shipped	Percent	Tons shipped	Percent
1951	1,684,996	1,507,049	89.3	177,947	10.7
1952	1,504,172	1,350,279	89.7	153,893	10.3
1953	1,905,446	1,421,834	74.6	484,612	25.5
1954	1,694,738	1,012,034	59.7	682,704	40.3
1955	2,041,467	906,242	44.4	1,135,225	55.6
1956	1,943,926	1,209,480	62.2	734,446	37.8

The trend of the traffic from the rail to the barge routes convinced the respondents that their rates were no longer competitive with the barge or the barge-truck rates and that the reduced rates here under investigation were necessary to meet the competition. This trend to the barge routes was not limited to shipments originating at plants on the waterways, but occurred also on shipments from so-called landlocked plants. The number of carloads of wrought iron pipe transferred to barges at river points in the Pittsburgh area increased from 1,371 in 1947 to 9,304 in the first 10 months of 1955.

The experience of the Youngstown Sheet and Tube Company is cited as representative. During 1952, it shipped 315,150 tons of pipe from Youngstown to the Southwest, 85.6 percent by rail and 14.4 percent by barge. In 1955, it shipped 306,652 tons of pipe to the same area, of which 39.8 percent moved by rail and 60.2 percent by barge. This diversionary trend was alarming to the respondents, not only because of the immediate diversion of traffic, but also because of a threatened change in the location of some inland industries to sites from which barge service would be directly available. This shipper is considering expansion of its pipe-producing facilities, and states that unless all-rail rates are provided from Youngstown that are competitive with transportation costs from the Pittsburgh area mills, which have barge service, its future expansion will not be at Youngstown but at Indiana Harbor, Ind., where barge service is available. In order to be competitive with the Pittsburgh area producers, this company has been absorbing the cost of transporting pipe by rail from Youngstown to the Ohio River, as well as the terminal cost for loading the barges.

The pipe tonnage and revenue of the barge lines, most of which is from and to the points here concerned, in relation to their total tonnage and revenue, increased, respectively, from 3.09 and 5.71 percent in 1952 to 9.67 and 17.38 percent in 1954.

Compensatory nature of the rates.—The respondents submit many comparisons of representative minimum earnings under the present 40,000-pound and 70,000-pound rates, and rates based on the classification basis of class 35, minimum 40,000 pounds. For example, from Pittsburgh to Great Bend, 1,106 miles over a route of The Pennsylvania Railroad Company to St. Louis and the Missouri Pacific Railroad Company to destination, the rate of 87 cents for the minimum of 70,000 pounds yields $609 per car, 51.4 cents a car-mile, and 14.7 mills a ton-mile. The rate of 128 cents for the minimum of 40,000 pounds yields $512 per car, 43.2 cents a car-mile, and 21.6 mills a ton-mile, and the class-35 rate from and to these points of 150 cents, minimum 40,000 pounds, yields $600, 50.6 cents, and 25.3 mills, respectively. In general, the minimum yields of the rates under investigation, per car and per car-mile, are substantially in excess of those of the commodity rates, minimum 40,000 pounds, and approximately the same as, or higher than the class-35 basis.

Based upon rail tonnage handled in 1954, the revenue under the present rates would amount to $27,127,644. The out-of-pocket costs on this traffic, as computed by the protestants, would be $17,348,679, and the fully distributed costs, as computed by the respondents from the work papers of the protestants' witness, would be $25,587,907. Inasmuch as the present adjustment produces revenues almost $10 million in excess of out-of-pocket costs and $2 million

in excess of the fully-distributed costs, it appears that the adjustment, as a whole, is compensatory.

Competition between the steel companies.—The various steel companies in official territory strongly support the respondents and insist that the rate adjustment is necessary for them to effectively compete in the Southwest, not only with the Lone Star Steel Company at Lone Star, and the Colorado Fuel & Iron Company at Minnequa, which are closer to the destination area, but also with each other. The intensity of the competition is such that no producer can market its product at any greater laid-down cost in the Southwest than that charged by competing producers. Thus, the Youngstown and Lorain plants, which have no water service available therefrom, in order to compete with the Pittsburgh producers, who do have barge service available, must ship their pipe by rail to the river ports of Conway or Monaca, Pa., a distance of about 42 miles from Youngstown and 135 miles from Lorain, and absorb the rail charges to the river.

The Bethlehem Steel Company produces wrought iron and steel pipe at its plant at Sparrows Point, Md., and must meet the competition of plants in the Pittsburgh area, which are closer to the Southwest and enjoy lower rates. This party insists that it must have available rail rates that are reasonably related to those applicable from its competitors' plants if it is to share in the business. Under the present adjustment the rates from producing points east of Pittsburgh reflect the same differences over Pittsburgh as did the rates established on April 10, 1955, and the rate relations approximate those which have been maintained throughout the period since the basic 40,000-pound rates were established in 1940.

In addition to the intense laid-down price competition, there is competition in service reflected in the time of transit and ability to furnish the type and specific quantity of pipe required, particularly as between the more distant northern and eastern producers and the closer southwestern producers. The Lone Star Steel Company, for example, can and does provide delivery by truck to sites up to 400 miles from its plant at Lone Star within 24 hours. Confronted with this service disability, the northern and eastern mills established stock piles of pipe at various ports and points in the Southwest, including Houston, Corpus Cristi, Vidalia, La., Memphis, Tenn., and Kansas City. This method of assembling ex-barge pipe stocks at gateway ports in the Southwest has been increasingly utilized by the major oil companies as a saving in transportation cost and efficiency in operation.

Barge-line protestants' investment.—The barge-line protestants have substantial investments in equipment and property which they claim will be destroyed if the respondents are allowed to establish and maintain rates such as those here under investigation. For example, in 1954, the American Barge Line Company owned floating equipment valued at over $10 million, the Mississippi Valley Barge Line Company had a net property value of almost $20 million, and the Union Barge Line Corporation had an investment in floating equipment of about $14 million. The record does not disclose the value of the investments held by other barge lines concerned, including Coyle Lines, Inc., Dixie Carriers, Inc., Federal Barge Lines, Inc., Sioux City and New Orleans Barge Lines, Inc., John I. Hay Company, and Gulf Canal Lines, but they are substantial.

Additional costs over barge-line routes.—As indicated, the respondents established all-rail rates which

were, in general, based on the corresponding barge-truck combinations. The protestants insist that certain other cost factors in connection with the barge-truck routes also should have been considered. Much of the pipe shipped by barge into the Southwest is produced at mills located off the water and shipments therefrom are subject to additional expenses for transportation to the ports and for loading the barges. During the first 10 months of 1955, 961,896 tons of pipe were shipped by barge from the Pittsburgh area, of which 487,784 tons, or 50.7 percent, incurred weighted-average costs for transportation to the port and for transfer to barges of 17.25 cents or $3.45 per ton. During the same period, 139,261 tons were shipped by barge from the Chicago area, of which 77,324 tons, or 55.6 percent, incurred weighted-average costs for transportation to the port and transfer to barges of 19.6 cents or $3.92 per ton. Pipe shipped from Youngstown and Lorain, for example, is subject to costs of $2.60 and $4.20 per ton, respectively, for the rail haul to the port, plus a loading charge of $1 per ton. Also, it appears that no mill is so situated that pipe may be loaded direct from the point of manufacture. It must first be moved to a dock, generally in a rail car. Additionally, barges are sometimes shifted from one loading point to another to complete loading, at additional expense.

From the Chicago area the principal shipper has been Republic Steel, which has access to barges at its South Chicago plant. To reach the barge the pipe is hauled by straddle trucks about 1 mile, or it is loaded in a rail car and switched to the dock at a cost of $7.13 per car. No estimate of the cost of the straddle-truck movement is shown. The barges are then loaded with the use of cranes owned and oper-

ated by the shipper. John I. Hay Company, a barge-line protestant, operates similar cranes at its public docks, and its charge for loading pipe is 90 cents a ton. A few shipments are made from Gary, Ind., and Indiana Harbor. From these points a switch move is required at a charge of $1.60 a ton, plus a loading charge of 90 cents a ton. From Milwaukee, during the first 10 months of 1955, more than 54,000 tons were shipped by barge. That pipe was moved in rail line-haul service to Chicago or Joliet, Ill., and the present rate therefor is $3.40 per ton, to which must be added the loading charge at Chicago or Joliet of 90 cents a ton.

The foregoing charges or costs were not considered by the respondents in setting up their all-rail rates. Generally, these charges are borne by the manufacturers, which normally sell their pipe f. o. b. barge or rail origin, and thus, the respondents regard them as outside the competitive scope of the rates in that the consumer is interested only in the respective charges beyond the loading points. However, the Milwaukee shipper does not absorb the charge to the port in that its pipe generally is sold f. o. b. mill. The type of pipe manufactured at Milwaukee is not produced by mills in the Chicago area and competition is primarily with mills in the Pittsburgh area.

It appears also that no consideration was given, in constructing these rail rates, to a charge imposed at the principal destination ports for transfer of the pipe from barge to storage for later movement beyond by truck. The respondents state that much of the traffic moves through the ports without going into storage, and that, in any event, the charge, generally $1.30 a ton, is often absorbed by the outbound motor carriers. The record does not indicate how much of the pipe moves through the ports without storage, but appar-

ently the tonnage is quite substantial. Witnesses for the steel companies acknowedge that frequently a charge was incurred by them on their shipments stored at the ports. For example, Republic Steel paid the $1.30 transfer charge at Houston and Vidalia. It also paid $1.45 per ton for unloading at Kansas City, plus a truck-loading charge of $1.40 per ton, and also $3.36 per ton for transfer to storage at Harvey, La. The barge-truck combinations over Kansas City used as basis for all-rail rates, however, do include a terminal charge of $1.45.

The protestants point out that the inventories maintained at the ports also represent a cost item incurred on barge shipments. Prices at the port stock piles are generally 4 percent higher than the Pittsburgh base price, plus the barge transportation costs. Thus, on oil country pipe which is valued at present at about $180 per ton at Pittsburgh, the price at the stock pile, not including the transportation charge, would be about $7.20 per ton higher, which amount the protestants believe represents the cost of establishing and maintaining the inventory.

Additional costs via all-rail routes.—As stated, the rates under investigation in general are alleged by the respondents to be equal to the barge-truck combinations to the southwestern rail heads. However, the respondents urge that much storage yard is under the control of the operator thereof, who can by such choice of location control or eliminate the cost of the delivery expense; in other words, that any expense for transportation from a rail head to a storage yard, if there be any, is not an essential expense and should not be included in a comparison of transportation costs over the rail route with those over the barge-truck routes. The record is indefinite as to the volume of the traffic delivered to points either on or off the rail heads.

The protestants also challenge the statement by a representative of the Philips Petroleum Company that its unloading costs would average about 10 cents. One of the principal trucking companies of pipe has a tariff charge of $1 per ton for unloading pipe from a rail car, and the cost data of certain other parties supporting the respondents indicate that their unloading costs are about 5 cents or less.

Effect of reduced rail rates on barge operations up the Missouri River.—As above shown, the present rates to Kansas, Oklahoma, and southwestern Missouri, which were based on barge-truck combinations over Kansas City, were established on August 31, 1955, and other rates in issue were established on December 17, 1955, but were resuspended on August 29, 1956. At the hearing in March 1956, the protestants submitted evidence concerning the effect of the rail reduction to Kansas, Oklahoma, and southwestern Missouri on barge operations up the Missouri River.

Early in 1955, a pipe terminal and storage yard was opened at Kansas City by the Kansas City Dock and Storage Company, and another was opened by an individual at Pomeroy Bend, Kans., which is on the Missouri River near Kansas City. During 1955, the terminal at Kansas City handled 49,347 tons and that at Pomeroy Bend 32,109 tons of pipe. In addition, Kansas City had available two other terminals with limited facilities, one of which handled 11,649 tons and the other about 300 tons of pipe. Barge traffic on the Missouri River is suspended during the winter months and the last shipment in 1955 arrived late in October. The respondents point out that barge shipments continued to move after August 31, the date the reduced rates became effective, but the protestants assert that pipe manufacturers and supply companies who were maintaining storage stocks at Kansas City

could not immediately accomplish a reversal of the distribution methods used, and that barge shipments arriving after that date were largely to fulfill commitments made previously.

Prior to March 1956, the operator of the Kansas City Dock and Storage Company made inquiries of his customers concerning their plans for barge shipments to his terminal in 1956 and was informed that they had no plans for barge shipments thereto. The steel companies and supply companies with which he had contracts in 1955 had closed out all of their stocks. As a result the terminal was closed, the personnel was laid off, and the equipment was turned back to the lessors. The operator of the yard at Pomeroy Bend made like inquiries of his customers and found that none had any program with respect to barge shipments on the Missouri River in 1956.

In the barge industry it is the practice to book barges in advance, and in 1955 The Sioux City and New Orleans barge line had requests for barges for pipe loadings to the Missouri River as early as the middle of February. In 1956, up to the time of the hearing, no such requests had been received, and neither that line nor Federal Barge Lines had been able to secure a single booking of pipe to the Missouri River for 1956. Solicitation efforts all indicated that shipments during the year would be given to the rail carriers. Certain steel companies supporting the respondents admitted that none of the tonnages booked for 1956 had been scheduled for barge movement through Kansas City. Only 3,302 tons of pipe were handled by barge on the Missouri River in that year. The conclusion is warranted that establishment of the present rail rates to points in Kansas, Oklahoma, and southwestern Missouri effectively resulted in the

elimination of substantially all of the barge-truck shipments to such points.

Competition with ocean routes.—From points east of Pittsburgh such as Chester and Fairless, Pa., Claymont, Del., and Sparrows Point, the rail-ocean-rail rates have long been lower than the all-rail rates. However, the all-rail rates established on December 17, 1955, under investigation here, were constructed with relation to the reduced rates established from Pittsburgh and are now generally lower than those over the coastwise routes. For example, from Sparrows Point to Alice, Tex., the all-rail rate was reduced from 138 to 85 cents. The rail-ocean-rail rates remained at $1.03. Thus, the 35-cent difference in favor of the coastwise route was changed to an 18-cent difference in favor of the all-rail route. The coastwise lines have enjoyed a regular movement of pipe from eastern origins to the Southwest and during 1955 handled the equivalent of more than 250 carloads. They insist that the rates established on December 17, 1955, would divert to the rail lines all of the pipe traffic normally handled by the coastwise lines. However, the respondents have offered to join with the coastwise carriers in corresponding reductions in the rail-ocean-rail rates.

The southwestern trucking companies.—There are about 300 trucking companies in the Southwest which specialize in the hauling of pipe and other oil-field supplies and equipment. About 90 percent of their traffic consists of pipe. These protestants estimate that they would lose about $12 million in revenue annually if the rail rate reduction is 100 percent effective in diverting the traffic to the rail lines. In general, the operating ratio of this industry is over 95 percent and the hauling of pipe is vital to their continued operation. One witness testified that the

motor carriers were in need of an upward revision of their rates to compensate for increased costs, that his company and others have been attempting to have the industry raise its rates, but that in the face of the reduced rail rates no increase would be possible. An investigation was instituted by the Commission on November 21, 1955, into the lawfulness of the rates, charges, rules, regulations, and practices maintained by motor common carriers transporting oilfield equipment, materials, and supplies, including pipe, from, to, and between points within an area embracing 10 western and southwestern States, including the destination States involved in the instant proceeding. In a report therein, *Oilfield Equipment To And Between The Southwest,* M. C. C. —, decided on April 24, 1957, the Commission found, among other things, that rates on oil country pipe maintained by many such motor carriers are unjust and unreasonable to the extent they are lower than a minimum reasonable basis therein prescribed. As stated, the respondents before us here expressed their purpose to be to meet the lowest level of competitive barge-truck rates. Apparently, the truck components of these rates, for the most part, are the rates found to be depressed in the motor-carrier investigation. Also, in constructing the rates here under investigation, the respondents failed to take into consideration, in many instances, the cost of transferring pipe from barge to truck based on their belief that such charges are generally absorbed by the motor carriers. Such absorptions by motor carriers were found, in the motor-carrier investigation, to be unlawful.

Port interests.—The ports of Brownsville and Corpus Christi and a terminal operator at Kansas City oppose these rates in that they are fearful of a diversion of the traffic to the rail lines, with a con-

sequent loss of traffic to the terminals. Large capital sums have been invested in these facilities, which are dependent upon water-borne traffic. The Kansas City terminal operator apparently is dependent wholly upon barge pipe traffic and as indicated at the time of the hearing in March 1956, his yard was closed because of lack of business, and no business was expected so long as the present rate situation remained.

Western steel companies.—On behalf of the Lone Star Steel Company, it is alleged that the rate adjustment here in issue is unduly preferential of northern and eastern producers and unduly prejudicial to the western producers. This company manufactures only certain grades of oil country pipe, and its f. o. b. mill price is $10 a ton higher than the Pittsburgh base price. Thus, in those instances where the Lone Star mill can provide a lower laid-down cost on pipe, it comes about by reason of the geographical location of its plant closer to the point of consumption.

Effective on April 30, 1956, the respondents established reduced rates from Lone Star to points in Kansas on the basis of class 30, minimum 40,000 pounds. The rates here in issue from the eastern steel plants, however, are in many instances as low as 20 percent, and in some instances 16 percent, of first class. For example, from Lone Star to Great Bend, 561 miles, the class-30 rate is 86 cents; the rate here in issue from the Pittsburgh area, including Youngstown, to Great Bend is 87 cents. From Youngstown to Great Bend, 1,063 miles, the class-30 rate is 124 cents. To Kansas City, 544 miles from Lone Star and 809 miles from Youngstown, the rates are 85 cents from Lone Star and 71 cents from Youngstown. If the class-30 basis were applied from Youngstown, the rate therefrom would be 107

cents. To many points in Oklahoma and Louisiana, the rates from Lone Star are lower than those from the Pittsburgh area because of the difference in distance, but the rates from Youngstown are in some instances as low as 16 percent of first class. For example, to Morgan City from Lone Star, 352 miles, the rate is 64 cents, whereas from Youngstown, 1,212 miles, the rate is 70 cents, or 16 percent of first class. The same situation exists with respect to many destinations in Texas.

Transit—Oklahoma City versus Houston.—The American Iron and Machine Works Company, of Oklahoma City, a protestant herein, is a manufacturer of rotary drilling tools. These tools are made from drill pipe to which a tool joint is attached. The tool joints are manufactured from forgings. This protestant receives its drill pipe by rail from the Pittsburgh area and its forgings from Bethlehem, Pa. The greatest oil and gas drilling activity at present is along the Texas and Louisiana Gulf coast, and the protestant's principal market is in that area. Its chief competitor has its plant at Houston.

The protestant's difficulty arises from the application of transit arrangements which permit transit on both drill pipe and forgings, but require application of the rate from origin to transit point when higher than the rate from origin to destination. The rate on drill pipe from the Pittsburgh area to Oklahoma City is 103 cents. The rates from the same area to points in Texas and Louisiana, in an area within about 300 miles from Houston, are lower than those to Oklahoma City, so that the Oklahoma City rate of 103 cents applies on shipments to these points when stopped at Oklahoma City. However, from Pittsburgh to Houston the rate, established on December 17, 1955, is only 70 cents. As the through rates to the

foregoing area are the same or higher than the rate to Houston no adjustment of the through rate is necessary on shipments transited at Houston. For example, to Beaumont the through rate is 70 cents, and shipments may be routed through both Oklahoma City and Houston. On a shipment stopped for transit at Houston the through rate of 70 cents would apply, whereas on a shipment stopped for transit at Oklahoma City the through rate would become 103 cents, even though the service performed in either instance would be almost the same. Because of liberal backhaul arrangements the fabricator at Houston also can ship to a point such as Longview, Tex., at the basic through rate, in this instance 88 cents, whereas the Oklahoma City fabricator would be subjected to rate of 103 cents even though the haul would be 369 miles shorter.

The Oklahoma City protestant alleges that the foregoing illustrations clearly show that the rates under investigation are unjustly discriminatory and give undue preference to the Houston fabricator. It does not assail the through rates as such but seeks a waiver of the rule which requires adjustment of the through rate when lower than the rate to the transit point. The protestant urges that relief from the long-and-short-haul clause of section 4 here sought should not be granted where, as in this instance, it would result in unjust discrimination and undue preference and prejudice.

Standard or merchant pipe.—Another protestant, the Laclede Steel Company, with its plant near Alton, Ill., in the St. Louis district, is engaged in the manufacture of buttweld pipe, 4 inches or less in diameter, which is generally referred to as standard or merchant pipe, and is used for the conveyance of gases, liquids, or steam under low pressure. The pipe is unlike oil-

field country pipe and line pipe in that it generally is purchased by and delivered to wholesale plumbing and heating distributors in the cities and the movement is usually by rail or truck. Only incidental movements have been handled by barge. For example, during 1955 the barge lines handled 90,694 tons of pipe to Kansas City of which only 312 tons consisted of merchant pipe.

Because the rate adjustment here in issue was made to apply on merchant pipe, as well as on oil country goods, and consisted of reductions that were greater from the plants of the protestant's competitors located in the Chicago, Pittsburgh, and related areas than they were from the protestant's plant in the St. Louis area. The protestant alleges that such rates are unduly preferential of its competitors and unduly prejudicial to itself. It urges that the relation of the rates on merchant pipe from its mill and those of its competitors should not be controlled by the character of the competition confronting the rail lines in the transportation of oilfield country pipe.

Historically, the price of merchant pipe at the Chicago area mills has been 10 cents, and that at the Pittsburgh area mills 20 cents, under that at the protestant's Alton mill. Prior to the present rate adjustment, the protestant had been afforded the benefit of its geographical location on shipments to the Southwest, and it had a rate advantage which overcame the disadvantage of its higher origin price. Under the present adjustment the rate advantage is largely destroyed. For example, to Little Rock, Ark., the rates in effect prior to December 17, 1955, from St. Louis, Chicago, and Pittsburgh were 60, 80, and 91 cents, respectively. Taking into consideration the differences in the origin price, the protestant had a delivered price advantage of 10 cents under Chicago

and 11 cents under Pittsburgh. Effective on December 17, 1955, however, the respective rates from St. Louis, Chicago, and Pittsburgh became 56, 62, and 70 cents. Thereafter, the Chicago and Pittsburgh producers had a delivered price advantage over the protestant of 4 and 6 cents respectively. Similar illustrations are shown to points in Oklahoma, Kansas, Louisiana, and Texas. The Protestant argues that competition for the transportation of oilfield country goods should not be allowed to destroy its natural and normal advantage in the sale of merchant pipe in southwestern markets.

The respondents urge that merchant pipe is moved to the southwestern oil fields and that the inclusion of this commodity in the adjustment was proper. However, the record contains only incidental references to the production and movement of merchant pipe, and there is no indication of any substantial movement thereof by barge. On the contrary, the record is quite clear that the transportation of merchant pipe is not subject to the same competitive conditions as oilfield country goods, in that it does not move in comparable volume and the delivery points are substantially different.

Amarillo and Lubbock interests.—As indicated, the respondents established a new scale of rates on pipe, minimum 70,000 pounds, on April 10, 1955, to alternate with the existing rates, minimum 40,000 pounds. That adjustment was protested, but the Commission declined to suspend or investigate such rates and consequently they are not in issue here. The 70,000 pound rates to points west of a line running from Kiowa to Laredo, which includes Amarillo and Lubbock, were made on a higher basis than those to points east of that line on the theory that barge-truck competition to points west of the line was not as intense

as that to points east thereof. Subsequently, reductions established on December 17, 1955, which were based on the barge-truck combinations over the Gulf ports, gave no reduction to Amarillo and Lubbock but in many instances made additional reductions to points in Texas generally east of the foregoing line. Thus, Amarillo and Lubbock are on a rate plateau which has narrowed the markets of their distributors and broadened the markets of distributors located at such points as Houston and Fort Worth.

For example, prior to the April 10 adjustment the rates from Pittsburgh to Wichita Falls, Tex., and Lubbock were $28 and $30.40 a net ton, respectively, a spread of $2.40. The present spread, Wichita Falls under Lubbock, is $4. Amarillo and Lubbock interests fear that the greater reductions to their competitors east of the line will seriously reduce the carriers' earnings and that the higher earnings on traffic to Lubbock and Amarillo will be used to offset these losses. The minimum car-mile yield, Pittsburgh to Lubbock, 1,494 miles, is 61.85 cents, while to Wichita Falls, 1,307 miles, it is 59.98 cents. These protestants allege that the rates under investigation are unduly preferential of points such as those mentioned and unduly prejudicial to Amarillo and Lubbock.

Effect of rate adjustments on revenues of rail carriers and barge lines.—An experienced traffic consultant was employed by the protestant barge lines to make studies of the revenue effect of the present rate adjustment. He concluded that the reductions made by the respondents in 1955, as applied to traffic handled in 1954, would result in a reduction in gross revenues annually of $11,692,456, and that the respondents, in order to overcome this reduction would have to increase their volume of pipe traffic by 638,867 tons. He also computed that the 1954 rates and ton-

nage resulted in a contribution to overhead of $21,471,421, whereas at the present rates the contribution to overhead would have been only $9,778,965. The additional traffic required to make the same contribution to overhead would be 2,059,700 tons. The barge lines operating on the Mississippi River System and the Gulf Intracoastal Waterways originated, during 1954, 1,380,337, tons of pipe so that according to this study, if all of the traffic were diverted to the rail lines the contribution to overhead would still be less than that received in 1954.

A separate analysis was made of the adjustment to Kansas and Oklahoma. In 1954, the rail rates and tonnage resulted in revenues which provided a contribution over out-of-pocket cost of almost $9 million. If the 1955 barge line traffic were subtracted the contribution to overhead would have been reduced to about $6 million. But if the present rates had applied to the 1954 tonnage the contribution to overhead would have been under $4 million. In other words the protestants aver that the respondents are willing to sacrifice more than $2 million a year in order to destroy the barge-line competition.

The respondents offered no challenge to the foregoing computations but merely pointed out they are based on the fallacious assumption that the respondents would continue to handle their 1954 or 1955 volumes of traffic. The protestants' own figures indicate that the present rates are compensatory and result in a contribution to revenue which the respondents believe would be lost if the former rates were retained.

Another study was made which indicates that iron and steel pipe traffic contributes from 17 to 32 percent of the total revenues of the principal barge lines, but contributes only 1 percent of the total revenue of all

class-I railroads. While it is not denied that pipe constitutes an important source of revenue to the barge lines, a more helpful showing was made by the respondents wherein they disclosed that on rail traffic from official territory to the Southwest the pipe tonnage contributed 26.7 percent of the total revenue in 1950 and 23.1 percent of the total revenue in 1954.

Federal Barge Lines carload rates.—For many years the Federal Barge Lines, or its predecessors, together with the rail lines, have maintained through routes and joint rates on pipe and other commodities, in carload lots, differentially related to the all-rail rates. In Ex Parte No. 96, *Through Routes and Joint Rates,* 153 I. C. C. 129, and later reports, the Commission prescribed a formula whereby minimum differentials were required, subject to a proviso that lesser differentials could be established by agreement of the parties.

The operations of this barge line were originally confined to carload business. This business expanded to its peak in 1938, when about 1,000,000 tons were handled. About that time other barge lines began to develop in size and to concentrate on bargeload service. There has since been a trend in the traffic from carload to bargeload lots. This line also developed bargeload service, and the carload freight presently handled by Federal has diminished to less than 20 percent of its total traffic. The number of tons of pipe in carloads handled by it declined from 5,939 in 1953 to 1,697 tons in 1954. Practically all of the carload shipments were to hardware companies, plumbing supply companies, and similar jobbers who handle merchant pipe.

Except for the fact that the differentials were voluntarily narrowed in 1952, differential rates under the formula prescribed in Ex Parte No. 96 have been

maintained on rates subject to a minimum of 46,000 pounds. However, on April 10, 1955, the rail carriers established lower rates subject to a minimum of 70,000 pounds. Nor were differentials for the barge routes provided in the later adjustments here under consideration. For example, from the Pittsburgh area to the Houston group the respective rates prior to April 10, 1955, were 130 cents all-rail and 124 cents rail-barge-rail. On that date the all-rail rate established was 104 cents and on December 17, 1955, it was further reduced to 70 cents. Basically, the same situation exists with respect to all other rates here concerned.

This protestant contends, not only that the all-rail rates are in violation of the Commission's order in Ex Parte No. 96, but that they are unduly prejudicial to it, in violation of section 304 of the act. Attention is directed to the decision of the Supreme Court in *Dixie Carriers* v. *United States*, 351 U. S. 56, wherein the court held that where there is discrimination by the use of a joint rate to favor rail carriers over water carriers and to deprive the latter of their "inherent advantages", it is the duty of the Commission to end it under section 307 (d) of the act.

The respondents deny that the order in Ex Parte No. 96 is still effective. In view of the findings hereinafter, it is not necessary to resolve this issue.

Discussion and conclusions.—The principal issue here concerns the need of the respondents for reduced rates on oilfield country pipe, including line pipe, to meet the competition of combination barge-truck rates and service from and to the same points. That the respondents' former rates on this important segment of traffic were not adequately competitive is firmly established by this record, which shows a diversion of much of the traffic to the barge and barge-truck

routes. There remains, however, the question of the level of the rates necessary to meet such competition, and various other collateral matters.

Because of the vast scope of this adjustment and the many different situations encountered, it is not practicable to compare specific movements and the various disabilities or advantages attendant upon each. Instead, general overall comparisons must be made.

Two basic transportation characteristics which are fundamentally different in barge and rail service are the minimum loading requirements and the transit time. Barge shipments must be loaded to a minimum of 500 tons, whereas the rail minimum is only 35 tons. The transit times vary with the movements, but in general the transit time over the barge routes is substantially greater than that over the corresponding rail routes. The respondents do not concede that the differences in the barge and rail services warrant any differential rate treatment, because many receivers of pipe are readily able to receive and accumulate bargeload lots of pipe, and because storage stocks of pipe are sometimes maintained in the destination area to satisfy the need for expeditious delivery service. However, the protestant barge lines insist, and some shippers admit, that traffic will not move by the barge route except under differential rates. On this record it is impossible to measure with any degree of accuracy the difference in the value of the service over the respective routes, but it is apparent that the difference is material and should receive consideration.

As indicated, certain producers have no direct access to water service and are subjected to additional costs incidental to the transportation to and the loading of barges from their plants. The respondents consider all costs which are incidental to the barge loadings as outside the competitive scope of the re-

spective rates in that the consignee, who pays the freight, is interested only in the charges beyond the loading points. But this record is not convincing that the producers who would bear these incidental costs would have no influence in the routing so as to avoid such expenses. Moreover, the large steel companies have adopted the practice of maintaining storage stocks in the Southwest from which they sell their pipe, and the shipments to such storage piles are controlled by the producer. For example, the Youngstown Sheet & Tube Company would not be apt to ship by barge to and through a storage yard at a Gulf port when it could ship by rail direct to destination at the same rate without incurring the cost of the movement to the barge or the barge loading charge. In addition, the record reveals a shipper at Milwaukee who does not absorb the cost of transferring shipments from its plant to barge at Chicago and Joliet. When consideration is given to the over-all situation, it is apparent that the costs incidental to barge loadings are a material factor to be considered.

Another cost incidental to barge-truck movement is the transfer charge at the destination port. The respondents apparently constructed their all-rail rates on the belief that transfer charges at the ports were generally absorbed by the motor carriers, and that some shipments move directly through the ports and do not incur the charge. But, other than the testimony of one shipper that about 50 percent of its shipments moving through Houston in January 1956, did not incur the charge there is little evidence of record to establish that such charge is not generally incurred. On the contrary several shipper witnesses supporting the respondents readily admitted that such charges were being incurred, and as seen, absorption of such charges by the motor carriers was found to be unlaw-

ful in *Oilfield Equipment To And Between the Southwest, Supra.* In their exceptions, the respondents argue that barge truck service without storage is available and alone necessitates this competitive level of rail rates. In a particular situation this might be true. But where, as here, an extensive adjustment of rates is under consideration all factors must be viewed in their proper perspective to the whole, and we cannot ignore the fact that barge traffic generally is stored at the ports and is subject to additional charges therefore. These factors should have been given some consideration in the establishment of the all-rail rates.

On the other hand, the respondents contend that rail shipments are subject to a cost disability of about $4.82 per ton for the added expense of unloading rail cars and moving the tonnage from the rail heads to the job sites or storage yards; and to a service disability in that truck deliveries from port stock piles can be made more expeditiously than rail shipments from producing points in the East. The alleged cost disability of $4.82 per ton is based on a composite average of the added costs on about 4,000 tons of pipe shipped to four oil companies out of the more than 1 million tons shipped by rail each year into the Southwest. We are not convinced that the shipments submitted were representative of the whole. However, this does not alter the fact that the respondents are subject to some disability in this respect which must be given consideration.

With respect to the alleged rail service disability, there can be no question but that it is advantageous to receivers of pipe to receive expedited delivery from port stock piles. As previously indicated, however, the price of pipe at the port stock piles is subject to a markup, at the time of the hearing about $7.20 per

ton, and it seems apparent that the more expeditious delivery is offset to some extent by the added expense incurred. Furthermore, as the overall supply of pipe is often short there is no reason to assume that adequate supplies can always be maintained at the port stock piles. An overall comparison of the two types of service and all of the advantages and disadvantages attendant on each leads to the conclusion that the disabilities present in the barge-truck service outweigh those present in the all-rail service, and are persuasive that the rates here under investigation are lower than necessary to afford the respondents a fair opportunity to compete for the traffic. The discontinuance of barge-truck service via Kansas City after these rates were established strongly supports this conclusion.

The respondents and supporting parties also allege that these rates are necessary to permit the northern and eastern producers to meet the competition of western steel companies. To the contrary, however, the evidence of the Lone Star Steel Company indicates that the rates are unduly preferential of the northern and eastern producers and unduly prejudicial to the western producers. It is clear that the rates under investigation have the effect of depriving the Lone Star producer of the benefits of its geographical location and give an undue advantage to its more distant competitors. One of the principal purposes of section 3 (1) of the act was to eliminate favoritism among competitors. If carriers elect to establish rates to enable some shippers to meet commercial competition in particular markets, they must afford all shippers, similarly situated, an equal opportunity. The failure of the respondents to afford the Lone Star producer rates to the southwestern markets on the same relative basis as those afforded

similarly landlocked producers in the East does not contravene section 3 of the act, as alleged, inasmuch as the record indicates that the eastern landlocked producers do nevertheless ship by barge while the Lone Star producer does not, and hence transportation conditions are dissimilar. However, to the extent that the proposed rates from these origins are lower than necessary to meet the competition of the barges and barge-truck lines to the points served by these producers and the producer at Lone Star, such rates unduly prefer these eastern producers and unduly prejudice the Lone Star producer, and constitute the undue preference and prejudice prohibited by the act. A like conclusion is reached with respect to the publication of the proposed rates from the eastern origins to points in Texas and Louisiana, in that such rates, to the extent that they are lower than necessary to meet barge or barge-truck competition, unduly prejudice the Oklahoma City protestant and unduly prefer fabricators at Houston and elsewhere, as previously described.

A somewhat similar situation exists as to the application of these rates to standard or merchant pipe. No need for a reduction in the rates on this product has been shown to meet either commercial or carrier competition. On the other hand, the protestant at St. Louis has shown that existing relations in the rates on this product would be seriously disrupted with effects prejudicial to it and preferential of Chicago and Pittsburgh producers. Federal Barge Lines also has been handling merchant pipe in carload lots under joint rail-barge rates differentially related to the all-rail rates, and in this adjustment the respondents have totally ignored the protestants' right to such differential rates. In the absence of a positive showing of a competitive need for these reduced rates

on merchant pipe, what we have said with respect to the rates from Lone Star applies with equal vigor to the rates from the St. Louis area, and warrants the conclusion that the rates are unduly prejudicial to the producer at that point and unduly preferential of its eastern competitors.

It is conceded by the respondents that the coastwise carriers are entitled to a differential in their rail-ocean-rail rates from the East to the Southwest in that they now have offered to join with such carriers in corresponding reductions. In view of our conclusions no specific finding is necessary on this issue. If in the future a downward revision of the rail rates is proposed, then respondent should join with the coastwise carriers in establishing rates resulting from the motor carrier investigation above referred to. The responsibility for the establishment of a properly related adjustment, which will be fair and just to all modes of transportation concerned, and which will avoid the unlawfulness in the present adjustment above indicated, rests upon the carriers themselves. Accordingly, our findings herein are without prejudice to the filing of new schedules not inconsistent with our conclusions herein.

We find that the rates here under investigation are not shown to be just and reasonable. Appropriate orders requiring their cancellation, and denying the fourth-section applications, will be entered.

APPENDIX A TO INTERSTATE COMMERCE COMMISSION REPORT

Effective date	Minimum (pounds)	Representative rate changes from Pittsburgh, Pa., to—			
		Arkansas City, Kans.	Oklahoma City, Okla.	Dallas, Tex.	Houston, Tex.
July 28, 1940	40,000	84	86	86	----------
	46,000	----------	----------	----------	78
Mar. 18, 1942	40,000	89	91	91	----------
	46,000	----------	----------	----------	83
May 15, 1943	40,600	84	86	86	----------
	46,000	----------	----------	----------	78
Nov. 1, 1943	40,000	84	86	86	78
July 1, 1946	40,000	89	91	91	83
Jan. 1, 1947	40,000	94	96	96	88
Oct. 13, 1947	40,000	103	106	106	97
Jan. 5, 1948	40,000	113	115	115	106
Jan. 13, 1948	40,000	105	107	107	99
May 6, 1948	40,000	108	110	110	102
Aug. 21, 1948	40,000	110	112	112	104
Jan. 11, 1949	40,000	116	118	118	109
Sept. 1, 1949	40,000	120	122	122	113
Apr. 4, 1951	40,000	122	124	124	115
Aug. 28, 1951	40,000	129.32	131.44	131.44	121.9
May 2, 1952	40,000	138	140.3	140.3	129.95
Dec. 10, 1954	40,000	124.2	140.3	140.3	129.95
Apr. 10, 1955	40,000	124.2	140.3	140.3	129.95
	70,000	110	112	112	104
Aug. 31, 1955	40,000	124.2	140.3	140.3	129.95
	70,000	87	103	112	104
Sept. 10, 1955	40,000	121.9	140.3	140.3	129.95
	70,000	87	103	112	104
Dec. 10, 1955	40,000	130	137	140.3	129.95
	70,000	87	103	112	104
Dec. 17, 1955	40,000	130	137	140.3	129.95
	70,000	87	103	103	70

ORDER

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 11th day of July, A. D. 1957.

No. 31860

STEEL PIPE—EAST TO SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by order dated August 30, 1955, in No. 31860, division 2 entered upon an investigation into and concerning the lawfulness of rates, charges, regulations, and practices stated in certain schedules described in said order;

It further appearing, That by order dated October 20, 1955, in investigation and Suspension Docket No. 6491 the Commission ordered an investigation into and concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules until May 26, 1956; that by order dated December 7, 1955, division 2 vacated and set aside the said order of October 20, 1955, as of December 17, 1955, insofar as it suspended the operation of said schedules; that by judgment entered August 20, 1956, the United States District Court for the Southern District of Texas, Houston Division, declared said order of October 20, 1955, to be invalid; and that respondents, in purported conformity with the court decree, resuspended such schedules;

And it further appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that said division, on the

date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel the schedules of rates under investigation, on or before August 23, 1957, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that these proceedings be, and they are hereby, discontinued.

Fourth Section Order No. 18751.

STEEL AND WROUGHT IRON PIPE TO KANSAS, OKLAHOMA, AND SOUTHWEST MO.

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

By fourth-section applications Nos. 30890 and 31120, as amended, F. C. Kratzmeir, Agent, for and on behalf of carriers parties to his tariff I. C. C. No. 4116, and other tariffs named in the applications, according as they may participate in the traffic, applied for authority to establish and maintain rates on steel and wrought iron pipe, in carloads, from points in western trunkline, official, and southern territories to points in the Southwest, including Kansas and southwest Missouri, as described in the applications, without observing the long-and-short-haul provision of the Interstate Commerce Act. A hearing having been held, and full investigation of the matters and things involved in the applications having been made, and the division on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, and the applications as amended, are hereby referred to

and made a part hereof, and sufficient justification for the relief prayed not having been shown:

It is ordered, That said applications be, and they are hereby, denied.

By the Commission, division 2.

[SEAL] HAROLD D. McCOY,
Secretary.

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 16th day of October, A. D. 1957.

No. 31860

STEEL PIPE—EAST TO SOUTHWEST

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION NO. 30890

STEEL AND WROUGHT IRON PIPE TO KANSAS, OKLAHOMA AND SOUTHWEST MO.

FOURTH SECTION APPLICATION NO. 31120

STEEL AND WROUGHT IRON PIPE TO THE SOUTHWEST

Upon consideration of (1) the record in the above-entitled proceedings, (2) petition of respondents for reconsideration of the report of the Commission, Division 2, decided July 11, 1957, and replies to the petition by (3) Laclede Steel Company, (4) American Iron and Machine Works Company and Oklahoma City Chamber of Commerce, (5) the motor-carrier protestants, (6) Coyle Lines, Inc., and Dixie Carriers, Inc., (7) John I. Hay Company, (8) American Com-

mercial Barge Line Company, Mississippi Valley Barge Line Company; and Union Barge Line Corporation, and (9) Federal Barge Lines, Inc., and Sioux City & New Orleans Barge Lines, Inc.:

It is ordered, That the petition be, and it is hereby, denied, for the reasons that the findings and conclusions in the report of the Commission, Division 2, alleged to be erroneous, are fully supported by the evidence, and the matters submitted in support of the petition do not present substantial and material grounds to warrant reopening the proceeding for reconsideration.

It is further ordered, That the order entered in these proceedings, July 11, 1957, requiring the respondents to cancel the schedules of rates under investigation upon not less than one day's notice to this Commission and to the general public, which order was stayed pending disposition of the petition, be, and it is hereby, reinstated and modified so as to postpone the effective date thereof to November 20, 1957.

By the Commission.

[SEAL] HAROLD D. McCOY,
Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1957

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Office - Supreme Court, U.S.
FILED
DEC 3 1956
JOHN T. FEY, Clerk

Nos. 654-655

In the Supreme Court of the United States

OCTOBER TERM, 1956

UNITED STATES OF AMERICA, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.
ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

DIXIE CARRIERS, INC., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the District Court is reported in 143 F. Supp. 844. The court's opinion and its final judgment are set forth as Appendices B and C, respectively, of the appellants' jurisdictional statement in *Atchison, Topeka & Santa Fe Ry.* v. *Dixie Carriers, Inc.*, No. 647, this Term, which appendices are incorporated herein by reference. The Commission's un-

reported orders of October 20, October 21, December 7, December 7 (Corrected Order), December 9, December 16, and December 16, 1955 (I. & S. Docket No. 6491: Fourth Section Application No. 31,120), are set forth, respectively, in Appendices A, D, E, F, G, H, and I, *infra*, pp. 12–22.

JURISDICTION

This suit was brought under 28 U. S. C. 1336 to set aside and enjoin enforcement of orders of the Interstate Commerce Commission. The judgment of the District Court was entered on August 20, 1956, and the notices of appeal of the Commission and of the United States were filed, respectively, on October 18 and October 19, 1956. The jurisdiction of this Court to review the judgment on direct appeal is conferred by 28 U. S. C. 1253 and 2101 (b) and is sustained by the following cases: *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671; *American Trucking Assns.* v. *United States*, 344 U. S. 298.

STATUTES INVOLVED

Sections 4 (1), 6 (3), 13 (1), and 15 (7) of the Interstate Commerce Act, 49 U. S. C. 4 (1), 6 (3), 13 (1), and 15 (7), and Sections 8 (b) and 10 (e) of the Administrative Procedure Act, 5 U. S. C. 1007 (b) and 1009 (e), are set forth in Appendix J, *infra*, pp. 23–28.

QUESTIONS PRESENTED

Acting under Section 15 (7) of the Interstate Commerce Act, the Commission ordered the suspension

of certain proposed rate schedules pending a hearing and determination on the lawfulness of such schedules. Concurrently with the above action, the Commission, acting under Section 4 (1) of the Act, withheld relief from the long-and-short-haul provision of that section and assigned the matter for hearing along with the question of the lawfulness of the rates under Section 15 (7). Subsequently, on reconsideration, the Commission vacated the suspension orders but continued the investigation into the lawfulness of the rates and, pending the hearing, granted relief from the long-and-short-haul provision.

The District Court set aside the rate schedules while they were being investigated by the Commission and after they had been in effect almost ten months. The court also enjoined the orders of the Commission granting temporary Section 4 (1) relief.

The following questions are presented by these appeals:

1. Whether the Commission's order vacating the suspension is subject to judicial review.

2. Whether Section 8 of the Administrative Procedure Act required the Commission to make findings in support of its order vacating the suspension.

3. Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect and prior to a final decision on their lawfulness by the Commission.

4. Whether the Commission is required to hold a hearing before granting temporary relief from the long-and-short-haul provision of Section 4 (1) of the Interstate Commerce Act.

5. Whether Section 8 of the Administrative Procedure Act requires the Commission to make findings in support of its order granting temporary relief from the long-and-short-haul provision of Section 4 (1) of the Interstate Commerce Act.

6. Whether an order of the Commission under Section 4 (1) is subject to judicial review, particularly at the suit of competing carriers.

STATEMENT

On September 16, 1955, pursuant to the provisions of Section 6 (3) of the Interstate Commerce Act, rail carriers participating in the movement of pipe from the East and South to the Southwest filed with the Commission schedules of reduced rates to become effective on October 26, 1955. Concurrently, the rail carriers filed an application for authority to establish and maintain the rates set forth in the proposed schedules without observing the long-and-short-haul provision of Section 4 (1) of the Act. Several interested parties, including water carrier appellees, filed protests against the proposed rates, and petitioned for their suspension and investigation. Protests were filed also against the grant of Fourth Section relief.

Initial consideration of the petition for investigation and suspension of rates, and the application for Fourth Section relief, devolved, respectively, upon the Board of Suspension[1] and the Fourth Section

[1] The Board of Suspension consists of five employees of the Commission duly constituted as a board pursuant to the provisions of Section 17 (2) of the Act for the purpose of taking

Board.[3] On October 20, 1955, six days before the rates were to become effective, the Board of Suspension issued its order suspending the rates to and including May 25, 1956, and at the same time instituted an investigation into their lawfulness (Appendix A, *infra*, pp. 12–13).[4] The Fourth Section Board on October 21, 1955, voted to withhold relief pending hearing and to assign the application for hearing with the suspension proceeding. (Appendix D, *infra*, p. 14).[5]

On October 26, 1955, the rail carriers filed petitions for reconsideration of the order of the Board of Suspension and for immediate issuance of Fourth Section relief. Replies to such petitions were filed by interested parties. By order entered December 7, 1955, Division 2 of the Commission, acting as an appellate division, vacated the order of suspension of October 20, 1955, but continued the investigation into the lawfulness of the rates (Appendix E, *infra*,

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initial action on the investigation and suspension of rates pursuant to the provisions of Section 15 (7) of the Act.

[3] The Fourth Section Board consists of four employees of the Commission duly constituted as a board pursuant to the provisions of Section 17 (2) of the Act for the purpose of taking initial action on applications for relief from the long and short haul provisions of Section 4 (1) of the Act.

[4] The proceeding before the Suspension Board was styled I. & S. Docket No. 6491, *Pipe, Official and Southern Territories to Southwest.*

[5] The proceeding before the Fourth Section Board was called *Iron and Steel Pipe to the Southwest*, Fourth Section Application No. 31120.

p. 15).[4] On December 9, 1955, Division 2, acting as an appellate division, granted temporary Fourth Section relief pending a hearing of the application (Appendix G, *infra*, pp 18–19). The Commission, by two orders entered December 16, 1955 (Appendices H and I, *infra*, pp. 20–22), denied petitions for reconsideration of the orders of December 7 and 9.

The Commission, by notice dated November 25, 1955, assigned the matter for hearing before an examiner. The hearing was completed on March 9, 1956, but prior thereto, and two months after the rates in question had become effective, the appellees, on or about February 17, 1956, instituted the present action, which asked that the orders of December 7 and 9, 1955, be declared invalid *ab initio*.

The District Court heard argument on May 18, 1955, one week before expiration of the seven-months statutory suspension period authorized by Section 15 (7). It filed its opinion on July 31, 1956, and entered judgment on August 20, 1956. The judgment set aside the Commission's orders of December 7 and 9, 1955, and remanded the cause to the Commission for further proceedings not inconsistent with the court's opinion.

THE QUESTIONS ARE SUBSTANTIAL

These appeals raise questions as to the validity of both the Commission's rate-suspension procedure and its procedure in passing upon applications for tem-

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[4] Subsequently Division 2 issued a corrected order of December 7, 1955, which amplified the reasons for its action in vacating the prior order of suspension (Appendix F, *infra*, pp. 16–17).

porary relief from the long-and-short-haul provision of Section 4 (1) of the Act. The first three questions presented (*supra*, p. 3) relate to the Commission's rate-suspension procedure and are practically identical with the questions presented in the appeal taken by the United States and the Commission in *Amarillo-Borger Express* v. *United States*, 138 F. Supp. 411 (N. D. Texas).[*] This Court, by noting probable jurisdiction of that appeal (*United States* v. *Amarillo-Borger Express*, No. 224, this Term), has recognized the substantiality of these questions. We respectfully refer the Court in this connection to the jurisdictional statement filed in No. 224. As to the remaining questions, we believe them to be substantial for the reasons stated below.

1. Under Section 4 (1), relief from its long-and-short-haul provision may be authorized by the Commission "after investigation." The court below held that the statute thus "clearly implied that the question [whether such relief should be granted] shall be determined upon testimony and after a hearing." We submit, to the contrary, that the "investigation" for which it provides does not include a formal or adversary hearing. In *Inland Empire Council* v. *Millis*, 325 U. S. 697, 706, this Court, in distinguishing between statutory provisions for an "investigation" and a hearing, pointed out that an "investigation" was "essentially informal, not adversary", and "not required to take any particular form" or to constitute a hearing.

[*] The court below said that the instant case "is a parallel of" the *Amarillo* case, expressly approved the case, and adopted its "opinion, conclusions, and reasoning."

That Congress did not intend to make a hearing a requirement for grant of temporary or continuing Fourth Section relief is indicated by the fact that in many other sections of the Act Congress has specifically provided for a hearing. *E. g.*, Sections 1 (14), (15), (19), (21); 3 (1a); 5 (1), (2) (b), (7), (15); 13 (3), (4); 15 (1), (3), (6), (7), (13); 16 (1); 19a (a), 19a (i); 20a (5).

Not only has the Commission long and consistently construed Section 4 (1) as not requiring a hearing, but the Commission in a report to Congress advised it of this construction. A Senate Resolution adopted May 3, 1923, directed the Commission to make a report to the Senate of its administration of Section 4 of the Act, and the report submitted in February, 1924, in response to this Resolution showed that, of 5579 applications under Section 4 which had been entirely disposed of after investigation, there had been a hearing in only 303 and no hearing in 5276. *Administration of Section 4 of the Interstate Commerce Act*, 87 I. C. C. 564, 567.

In 1940, Congress amended Section 4 (1) by providing that tariffs proposing rates subject to that section may be filed when application is made to the Commission thereunder; and that, if the application is approved, the Commission shall permit the tariffs to become effective upon one day's notice. See second proviso of Section 4 (1), *infra*, p. 24. The requirement of a formal hearing prior to the granting of Fourth Section relief would largely nullify the Congressional intent to expedite the establishment,

upon Commission authorization, of rates which are within the purview of the section.[1]

2. The decision below further holds that, in an order granting temporary Fourth Section relief, "there must be some determination and disclosure of the basic reasons why temporary relief is granted." Having held that Section 4 (1) authorizes the grant of such relief only after a hearing, the court below concluded that an order granting such relief must be accompanied by the findings, conclusions, and reasons required by Section 8 (b) of the Administrative Procedure Act. The latter provision, however, applies only to administrative decisions "required by the statute * * * to be made on the record and with opportunity for oral hearing." *American Trucking Associations* v. *United States*, 344 U. S. 298, 320. Since, as we have shown (*supra*, pp. 7–9), a hearing is not required prior to Commission action on a Fourth Section application, the requirements of Section 8 (b) of the Administrative Procedure Act are inapplicable.

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[1] The rules adopted by the Commission likewise recognize the need for expeditious, informal administrative proceedings on Section 4 applications, particularly if the Commission concludes, on the basis of the application and the Commission's investigation thereof, that it should authorize the proposed reduced long haul rates pending the outcome of a hearing on whether to continue such authorization. A rule of practice adopted by the Commission provides (49 C. F. R. 1.200): "The proceedings of the Board of Suspension and the Fourth Section Board shall be informal. No transcription of such proceedings will be made. Subpoenas will not be issued and, except when applications or petitions are required to be attested [in the case of Fourth Section applications], oaths will not be administered."

3. Finally, the decision below holds that orders under Section 4 (1) are subject to judicial review at the suit of competing carriers. But the primary purpose of Section 4 (1) is to protect shippers against higher transportation charges for a shorter than for a longer distance over the same line or route in the same direction. The parties directly affected when the Commission "in special cases, after investigation", authorizes a reduced rate for the long-haul movement, are shippers at the intermediate points. However, the plaintiffs below (appellees here) are neither shippers at intermediate points nor representatives of such shippers.

Even shippers may not maintain a suit to restrain the enforcement of an order under Section 4 (1). *United States* v. *Merchants Etc. Ass'n*, 242 U. S. 178. As the Court there said (p. 188), an order under that section "is permissive merely", and "[t]he carrier is the only necessary party to the proceeding". If affected shippers or communities believe that the rates filed pursuant to a Fourth Section authorization are unreasonable or unjustly discriminatory, their remedy is to file a complaint with the Commission under Section 13 of the Act. 242 U. S. at 188. "To permit communities or shippers to seek redress for such grievances in the courts would invade and often nullify the administrative authority vested in the Commission". *Ibid.*

Although the appellee carriers may have had sufficient interest to participate in the administrative pro-

ceeding, that, of itself, did not give them standing to contest the Commission's action under Section 4 (1). See *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479, 486; *Atchison, Topeka & Santa Fe Ry.* v. *United States,* 130 F. Supp. 76, 78 (E. D. Mo.), affirmed, 350 U. S. 892. The conclusion of the court below that the carriers had standing to obtain review of the Commission's action because they were competitors "immediately, adversely and financially affected" loses sight of the fact that any such injury is merely "one of the inescapable consequences of competition." *New York Dock Ry.* v. *Pennsylvania R. Co.,* 62 F. 2d 1010, 1012 (C. A. 3). Cf. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 140.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

J. LEE RANKIN,
Solicitor General.
VICTOR R. HANSEN,
Assistant Attorney General.
ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Assistant General Counsel,
Interstate Commerce Commission.

DECEMBER, 1956.

APPENDIX A

SECOND CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 20th day of October, A. D., 1955.

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new reduced and increased rates and charges, and new rules, regulations and practices affecting such rates and charges, applicable on interstate or foreign commerce, to become effective October 26, 1955, and later, designated as follows:

JOINT TARIFF:
I. C. C. 4116 of F. C. KRATZMEIR, Agent, and
I. C. C. 4615 of H. R. HINSCH, Agent;
Supplement 43 thereto, except as follows: On page 6 thereof, ITEM 360–C, and on pages 2 and 4 thereof all matter referring to ITEM 360–C.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act

and constitute unfair and destructive competitive practices in contravention of the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates, charges and regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

It is further ordered, That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be deferred to and including May 25, 1956, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

[SEAL] Harold D. McCoy,

HAROLD D. McCOY, *Secretary.*

APPENDIX D

2073

At a Session of the INTERSTATE COMMERCE COMMISSION, Fourth Section Board, held at its office in Washington, D. C., on the 21st day of October, A. D. 1955.

ROBERT NEWEL,
R. R. SHERMAN,
R. H. LAWRY, JR.,
Members of the Board.

IRON AND STEEL PIPE TO THE SOUTHWEST

FOURTH SECTION APPLICATION NO. 31120

Voted to withhold relief pending hearing, and to assign the above application for hearing with I. & S. No. 6491.

APPENDIX E

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 7th day. of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition of the respondent requesting vacation of the order of suspension, and replies thereto; and good cause appearing therefor:

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

[SEAL]

Harold D. McCoy,
HAROLD D. MCCOY, *Secretary.*

APPENDIX F

CORRECTED ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 7th day of December, A. D. 1955.

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated October 20, 1955, the Commission, Board of Suspension, entered upon an investigation concerning the lawfulness of new reduced and increased rates, charges and regulations and practices stated in schedules designated therein, and suspended the operation of the said schedules to and including May 25, 1956;

It further appearing, That consideration has been given to a petition by respondents, filed October 26, 1955, requesting vacation of the order of suspension, and of replies by Newtex Steamship Corp., filed November 3, 1955, Brownsville Navigation District, filed November 4, 1955, Barge Service Corp., Youngstown Sheet & Tube Co., American Iron and Machine Co., Waterways Freight Bureau, filed November 7, 1955, thereto, and upon reconsideration of the previous action taken in this proceeding, we are reasonably satisfied that the said schedules if permitted to become effective would not result in rates and charges, rules, regulations, or practices which would be unjust and unreasonable, in violation of the Interstate Commerce Act or constitute unfair and destructive com-

petitive practices in contravention of the National Transportation Policy or be in contravention of the provisions of section 4 of the Interstate Commerce Act; Therefore,

It is ordered, That the said order of October 20, 1955, be, and the same is hereby, vacated and set aside as of December 17, 1955, insofar as it suspended the operation of the schedules designated therein, but that this proceeding of investigation of said schedules shall continue in full force and effect.

By the Commission, division 2, acting as an appellate division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX G

Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected)

Order

At a Session of the Interstate Commerce Commission, Division 2, acting as an Appellate Division, held at its office in Washington, D. C., on the 9th day of December, A. D. 1955

IRON AND STEEL PIPE TO THE SOUTHWEST

Upon consideration of the matters and things involved in fourth-section application No. 31120, as amended, filed by F. C. Kratsmoir, Agent, for and on behalf of carriers parties to his tariff I. C. C. 4116, according as they may participate in the traffic, for authority to establish and maintain the rates hereinafter described without observing the long-and-short-haul provision of section 4 of the Interstate Commerce Act, and upon further consideration of fourth-section order No. 17160, entered March 26, 1952, in applications Nos. 18826, 18827, 18828, et al., as modified and amended by supplemental orders entered in other applications from time to time, which applications, and order as amended are hereby referred to and made a part hereof:

It is ordered, That fourth-section order No. 17160, entered, modified, and amended as aforestated, be, and it is hereby, further modified and amended by adding thereto the following paragraph:

It is further ordered, That, upon the effective date of the rates as to which relief is here-

inafter authorized, and until the effective date of the further order to be entered after hearing in fourth-section application No. 31120. applicants therein be, and they are hereby, authorized to establish and maintain over their proposed routes, for the transportation of steel and wrought iron pipe and related articles, as described in exhibit 2 of the application, in straight or mixed carloads, minimum 70,000 pounds, from points in official, Illinois, southern, and western trunk-line territories to points in southwestern territory, as described in the application, as amended, the lowest rates that may be constructed over any line or route on the bases and in the manner proposed in the application, as amended, and to maintain higher rates from and to intermediate points; *Provided,* That rates from or to such higher-rated intermediate points shall not be increased except as may be authorized by this Commission nor exceed the lowest combination of rates subject to the Interstate Commerce Act.

The Commission does not hereby approve any rates filed under this authority, all such rates being subject to complaint, investigation, and correction if in conflict with any provision of the Interstate Commerce Act.

By the Commission, Division 2, acting as an Appellate Division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX H

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December, A. D., 1955

INVESTIGATION AND SUSPENSION DOCKET NO. 6491

PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

It appearing, That by an order dated December 7, 1955, the Commission, Division 2, acting as an appellate division, upon consideration of a petition requesting that the order of suspension dated October 20, 1955, be vacated, and replies thereto, and good cause appearing therefor, concluded to vacate the order of suspension as of December 17, 1955, but continued the investigation of the schedules involved;

It further appearing, That several of the protestants have requested reconsideration of the action of Division 2 mentioned above, and that the order of vacation be stayed pending further consideration;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 7, 1955;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX I

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, acting as an appellate division, held at its office in Washington, D. C., on the 16th day of December 1955

INVESTIGATION AND SUSPENSION DOCKET NO. 6491
PIPE, OFFICIAL AND SOUTHERN TERRITORIES TO SOUTHWEST

FOURTH SECTION APPLICATION NO. 31120
STEEL AND WROUGHT PIPE TO THE SOUTHWEST

It appearing, That by an order dated December 9, 1955, the Commission, Division 2, acting as an appellate division, upon consideration of a petition by respondents requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section application No. 31120, Steel and Wrought Pipe to the Southwest, be reversed, and the order of suspension be vacated, and replies thereto, and for good cause appearing therefor, concluded to grant the relief prayed for in aforesaid application and to vacate the order of suspension as of December 17, 1955, but to continue the investigation of the schedules involved;

It further appearing, That consideration has been given to petitions filed by several of the protestants requesting (1) reconsideration of the action of Division 2, acting as an appellate division, granting fourth section relief in the Twenty-sixth Supplemental Fourth Section Order No. 17160 (Corrected), Iron

and Steel Pipe to the Southwest, entered December 9, 1955, and that the order be stayed pending reconsideration; and (2) for oral argument in Fourth Section Application No. 31120 and Investigation and Suspension Docket No. 6491;

And it further appearing, That sufficient reasons have not been shown for staying the order of December 9, 1955; and that oral argument is deemed to be unnecessary;

It is ordered, That the said petitions be, and they are hereby, denied.

By the Commission, Division 2, acting as an appellate division.

[SEAL] HAROLD D. MCCOY, *Secretary.*

APPENDIX J

The pertinent provisions of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*, are as follows:

SEC. 4. (1)

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section, but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no

such authorization shall be granted on account of merely potential water competition not actually in existence: *And provided further,* That tariffs proposing rates subject to the provisions of this paragraph may be filed when application is made to the Commission under the provisions hereof, and in the event such application is approved, the Commission shall permit such tariffs to become effective upon one day's notice.

SEC. 6 (3)

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schdules in force at the time and kept open to public inspection: *Provided,* That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions: *Provided further,* That the Commission is hereby authorized to make suitable rules and regulations for the simplification of schedules of rates, fares, charges, and classifications and to permit in such rules and regulations the filing of an amendment of or change in any rate, fare, charge, or classification without filing complete schedules covering rates, fares, charges or classi-

fications not changed if, in its judgment, not inconsistent with the public interest.

SEC. 13 (1)

That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

SEC. 15 (7)

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders

without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such perod; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date

this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

The pertinent provisions of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1 *et seq.*, are as follows:

SEC. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

* * * * *

(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

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SEC. 10. * * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

U. S. GOVERNMENT PRINTING OFFICE: 1946